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HOWARD'S PRACTICE REPORTS

CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE AND
THE GENERAL PRACTICE

OF THE

STATE OF NEW YORK,

SELECTED FROM

DECISIONS OF ALL THE COURTS,



WITH NOTES,

BY R. M. STOVER.

WITH A BRIEF DIGEST OF ALL POINTS OF PRACTICE CONTAINED IN THE
STANDARD NEW YORK REPORTS ISSUED DURING THE
PERIOD COVERED BY THIS VOLUME.



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VOL. II.



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ERRATA.

In *Westover* agt. *The Aetna Life Insurance Company* (*ante*, p. 193), in thirteenth line from bottom of page, after the word "to" insert the words "an action could make."

In *Ward* agt. *Comeyys et al.* (*ante*, p. 429), in first line from top of page, after the word "reply" strike out "set up to the" and insert the words "to an."



HOWARD'S PRACTICE REPORTS,

NEW YORK.

NEW SERIES.

SUPREME COURT.

JOHN OLMSTEAD agt. MARY L. KEYES, HELEN M.
VOSEBURGH, *et al*

Costs — Who liable for, in case of transfer, &c., of cause of action — Code of Procedure, section 321 — Code of Civil Procedure, sections 3247, 3352.

Under section 321 of the Code of Procedure, one taking an assignment or becoming in any manner possessed of a cause of action after suit brought thereon is liable for all the costs of the action "the same as if he were a party," as well those accruing before as after the assignment. Section 3247 of the Code of Civil Procedure took effect September 1, 1880, and at that date section 321 of the old Code was repealed, but section 3352 of the Code of Civil Procedure protects all rights lawfully accrued or established previous to the repeal of section 321.

Where the right to the costs claimed had become fixed and established by judgment, and the interest of the person, in the cause of action had been acquired prior to the repeal of section 321, his liability for the costs still continues.

Under the second subdivision of section 3247, it being the same as section 321 of the Code of Procedure, a person becoming in any manner possessed of a cause of action after suit brought thereon is liable for all the costs of the action "the same as if he were a party," as well those accruing before as after he became so possessed.

Fifth Department, General Term, April, 1885.

Before BARKER, HAIGHT, BRADLEY and LEWIS, JJ.

APPEAL from an order of the Monroe Special Term denying the motion of Mary L. Keyes to compel Lemuel W. Bignall to pay her the costs, etc.

Olmstead agt. Keyes.

Richard C. Steel, for Mary L. Keyes.

Louis Marshall, for Lemuel W. Bignall.

HAIGHT, J.—The plaintiff as trustee collected the sum of \$1,811 upon a life policy of insurance issued upon the life of Lester V. Keyes. This money was claimed by the defendant Helen M. Vosburgh and others, children of the deceased by his first wife; and also by the defendant Mary L. Keyes, his widow.

This action was brought to determine their conflicting claims. It was tried at the Cayuga special term and resulting in a judgment in which the defendant, Mary L. Keyes, was awarded the money in question and costs against the other defendants. Appeals were subsequently taken from the judgment upon the part of the defendants, Helen M. Vosburgh and others, children of the first wife, to the general term and court of appeals, and the judgment was in each court affirmed, with costs.

Motion was then made upon the part of Mary L. Keyes to compel Lemuel W. Bignall to pay her the costs allowed her upon the entry of the judgment of the special term, fifty-six dollars and seventy-five cents, and also the costs allowed her in the general term upon the affirmance of the judgment, seventy-eight dollars and ninety-four cents, upon the ground that Lemuel W. Bignall, after the entry of judgment and before appeal was taken, purchased the interests of the children by the first wife of the deceased and took an assignment thereof and then prosecuted the appeal in their names. The motion was denied, and from the order entered thereon this appeal was taken.

The first question which it becomes necessary to determine is, whether or not Bignall did in fact purchase the claim of Helen M. Vosburgh and others, children by the first wife? The papers read upon the motion disclose the following facts: Charles M. Baker's affidavit states that he was the attorney

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for the plaintiff in the action: "And is informed and believes that after the rendering and entry of the judgment and before any appeal therefrom the rights and claims and cause of action of the defendants Catherine C. Livingston, Helen M. Vosburgh, Richard A. Keyes, Frederick A. Keyes, Cora Iona Keyes and Helen M. Vosburgh as administratrix of the goods, chattels and credits of Huldah Keyes, deceased, became the property of said Lemuel W. Bignall by assignment, purchase, transfer or contract therefor, and that said Bignall acquired his right, interest and property therein for the purpose of taking an appeal from said judgment to the general term of said court and also to the court of appeals, and did cause such appeal to be taken in the names of said defendants, both to said general term and court of appeals. That his information is derived from the statements made under oath by one Artemas C. Vosburgh, by one T. William Meacham and by said Lemuel W. Bignall; said statements under oath were made in course of proceedings supplementary to execution taken under an order, of which schedule "B" hereto annexed is a copy; that he was present when each of said statements were made, that they were reduced to writing and respectively signed in his presence by persons making them."

He further states that in or about August, 1882, at Syracuse, N. Y., he had a conversation with Lemuel W. Bignall in relation to the action and the judgment for costs rendered therein and in this conversation Bignall said: "That when he acquired his interests in said action it was understood or agreed that the defendants in whose names appeals were to be taken were to be relieved and protected against liability for further costs. Deponent then inquired what was the arrangement as to costs already in judgment before appeal to the General Term, to which said Bignall answered that nothing was said about that."

In the proceedings supplementary to execution referred to in the affidavit of Mr. Baker, the testimony of Artemas C. Vosburgh appears, and is as follows: "I am husband of

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Helen M. Vosburgh, one of the defendants in above entitled action. While the action of John Olmstead against Mary L. Keyes and others was pending, I acted as agent for Frederick A. Keyes, Richard A. Keyes, Cora Iona Keyes, Catherine C. Livingston and my wife, and also Mrs. Vosburgh as administratrix. I was authorized to act as agent for each one of the above named defendants as their agent. I had a transaction with Lemuel W. Bignall; Mr. Bignall was to take the case from where judge DWIGHT left it, to the general term, and if necessary to the court of appeals, and in the event of his winning the case he was to pay me, as the agent for the above named parties, three hundred dollars, and in case of his losing the case nothing. All above three hundred dollars he was to keep for himself. I think a memorandum was written and signed by Mr. Bignall and myself. * * * Mr. Bignall was to take the case and I be relieved from any further expense in the case. I communicated this agreement to all whom I represented, and they ratified it."

T. William Meacham also testified in the proceedings as follows: "I know Lemuel W. Bignall; have had a conversation with him in reference to case of *John Olmstead agt. Helen M. Vosburgh and others*. I signed a bond or undertaking in this action for Mr. Bignall at his request; my recollection of it is he had purchased the claim of Mrs. Keyes' children — that is, Mrs. Huldah Keyes' children; one was Mrs. Vosburgh, Mrs. Livingston, Cora Iona Keyes, and I supposed of Frederick and Richard A. Keyes. He did not say when he obtained his interest."

Lemuel W. Bignall himself also testified, in substance, that while the case of *John Olmstead agt. Mary L. Keyes and others* was pending in the supreme court he had a transaction with Helen M. Vosburgh and certain other defendants in relation to the matter in controversy; that it was after judge DWIGHT had rendered his decision and before the appeal was taken to the general term; that soon after judge DWIGHT gave his opinion, Mr. Vosburgh, the husband of Helen M.

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Vosburgh, stated to him that he was not going to appeal the case; that he, Bignall, reported the statement to Mr. Marshall and that Mr. Marshall suggested that he should have Mr. Vosburgh transfer the case to him so that the case might be appealed to the general term and if necessary to the court of appeals; that in the transaction he dealt with both Mr. Vosburgh and Mrs. Vosburgh; that the paper delivered to him was signed by Mrs. Vosburgh; that the whole object of the transfer was to enable Messrs. Ruger, Jenney, Brooks & French to appeal the case to the general term and to the court of appeals if necessary. That he thought the chances of success were sufficiently sure to warrant his having it transferred to him. In case they succeeded he was to pay \$300 in full payment. Otherwise the defendant's were not to have anything. That his recollection is that Mrs. Vosburgh signed the only paper that passed between them.

In opposition to the motion, Mr. Bignall read his own affidavit in which he says that prior to January, 1879, Vosburgh became indebted to him in a considerable sum of money loaned to him which he could not collect from Vosburgh; that one day Vosburgh stated to him the facts in this case and he became interested therein, believing that he might possibly be able by the collection of the same, to receive payment on his account. That after the trial and decision in favor of Mary L. Keyes, Mr. Vosburgh was somewhat discouraged, but that Messrs. Ruger and Marshall who had become intensely interested in the case and the questions therein, were desirous of having the same tested in the appellate courts; that partly to please them and for the purpose of securing the payment to himself of the indebtedness to Vosburgh, and in the hope of obtaining some remuneration for his trouble in the matter, he urged Vosburgh to continue the action, and *in view of the facts agreed that he would take care of the charges of the firm of Ruger, Jenney, Brooks & French*, and in case the suit terminated in favor of the children of Huldah Keyes, Vosburgh was to have \$300; that his object

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was not to acquire by assignment the title to the cause of action, but to secure himself for his claim and trouble, and to do a favor to his friends Messrs. Ruger, Jenney, Brooks & French; that thereupon Mrs. Vosburgh alone executed a paper in substance as stated, but that he does not believe that it was in form an assignment; that he has caused diligent search to be made, but it cannot be found; that his impression is that it was a mere embodiment of the foregoing facts. He also in his affidavit denies the statement sworn to by Mr. Baker as to the conversation had with him.

It will be observed that the affidavit of Mr. Bignall, read in opposition to the motion, modifies in some respects his testimony taken in the supplementary proceedings, and that he denies the statement sworn to by Mr. Baker. We are, however, of the opinion, after a careful reading of the affidavits, that it must be found as a fact that he became a purchaser of the claim of the children by the first wife to the money in controversy after judgment and before appeal; that he caused the appeals to be taken and was to have the money in case he succeeded; that in consideration for the claim he was to pay the expenses, and if successful, the sum of three hundred dollars.

In the second place it becomes necessary to determine whether he is liable for the costs under the facts as disclosed.

Section 321 of the old Code provides: "In actions in which the cause of action shall by assignment after the commencement of the action, or in any manner become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party, and payment thereof may be enforced by attachment."

In the case of *Walcott agt. Holcomb* (31 N. Y., 125, 126), DENIO, Ch. J., says: The provisions of the Code of Procedure in respect to the liability for costs of persons not parties to the record, is broader than the former practice of the courts or the corresponding provisions in the Revised Statutes. *It embraces in its language the case of one defending an action*

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in the name of the defendant on the record, and of a respondent on appeal.

In the case of *Genet agt. Davenport* (58 N. Y., 607), it was held that under section 321 of the Code of Procedure, one taking an assignment of a cause of action after suit brought therein, is liable for all of the costs of the action the same as if he were a party as well those accruing before as after the assignment.

It appears that executions have been issued upon the judgment against the judgment debtors residing in the state, and that such executions have been returned unsatisfied, and that Bignall is not an attorney or counselor of the courts in this state. The section of the Code quoted, as construed by the authorities referred to, appears to cover the case and to establish the liability of Bignall, if the section in question remains in force and unrepealed, so far as this case is concerned.

Section 3247 of the Code of Civil Procedure took effect September 1, 1880, and at that date section 321 of the old Code was repealed. Section 3352 of the Code of Civil Procedure, however, provides that "nothing contained in any provision of this act other than in chapter fourth, renders ineffectual or otherwise impairs any proceedings in an action or a special proceeding, had or taken pursuant to law or any other lawful act done *or right, defense or limitation*, lawfully accrued or established before the provision in question takes effect, unless the contrary is expressly declared in the provision in question. As far as it may be necessary for the purpose of avoiding such a result or carrying into effect such a proceeding or other act *or enforcing or protecting such a right, defense or limitation*, the statutes in force on the day before the provision takes effect, are deemed to remain in force, notwithstanding the repeal thereof."

The cost on affirmance in the court of appeals is not asked in the notice of motion herein. It is only the cost allowed on entering judgment of the special term and affirmance in the general term. The judgment of the special term was

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entered May 19, 1879, and that of the general term February 28, 1880, so that the right to these costs became fixed by judgment before section 321 of the Code of Procedure was repealed. It is true the appeal in the court of appeals was prosecuted afterwards, but it was not successful and does not consequently affect the judgment theretofore entered. An undertaking was given and a stay of proceedings secured pending the appeal to the court of appeals. Had it not been for the stay thus procured pending such appeal, this motion might have been made and granted before the repeal of section 321. To hold that Bignall is not liable under section 321 would be to relieve him from liability, because of the stay which he procured and which it is now determined was without merit and improper. It is such a result that section 3352 was intended to prevent. That section protects all rights lawfully accrued or established. The right to these costs had become fixed and established by judgment, and the interest of Bignall in the claim had been acquired prior to the repeal of section 321, and it appears to us that his liability for the costs still continues.

If, however, we are wrong in this conclusion, we are still of the opinion that Bignall would be liable under section 3247 of the Code of Civil Procedure. That section provides: "Where an action is brought in the name of another by a transferee of the cause of action, or by any other person who is beneficially interested therein; or where after the commencement of an action, the cause of action becomes by transfer or otherwise the property of a person, not a party to the action; the transferee or other person so interested is liable for costs, in the like cases, and to the same extent as if he was the plaintiff; and where costs are awarded against the plaintiff the court may, by order, direct the person so liable to pay them. Except in a case where he could not have been lawfully directed to pay costs personally if he had been a party as prescribed in the last section his disobedience to the order is a contempt of court. But this section does not apply to a

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case, where the person so beneficially interested is the attorney or counsel for the plaintiff if his only beneficial interest consists of a right to a portion of the sum or property recovered as compensation for his services in the action."

It will be observed that the first clause of the section pertains to cases in which action is brought in the name of another by a transferee or by a person beneficially interested, and that the second clause pertains to cases where the cause of action becomes the property of a person not a party after the commencement of the action. This second clause of the section is in substance a copy of section 321 of the Code of Procedure. The wording is in substance the same, and in the cases in which other words are made use of, they are used synonymously; as, for instance, the words "by transfer or otherwise" are used in the place of the words "by assignment or in any other manner." This second clause is not modified by that which follows, except that it does not apply where the person is the attorney or counsel of the plaintiff, if he has no beneficial interest aside from his compensation for his services in the action. The second subdivision of the section, being the same as section 321 of the Code of Procedure, the construction of that section as made in the case of *Genet agt. Davenport (supra)* must control.

Order reversed, with ten dollars costs and disbursements, and the motion granted.

LEWIS, J., concurred; BRADLEY, J., not voting; BARKER, J., not sitting.

Dick agt. Livingston.

SUPREME COURT.

WILLIAM H. DICK agt. HENRY W. LIVINGSTON.

Complaint—Demurrer—Mortgage—Owner of a junior mortgage not permitted to single out one of several parcels covered by his and an older mortgage and redeem that one parcel—Parties.

There is no general rules of law or equity which permits the owner of a junior mortgage to single out *one* of several parcels covered by his and an older mortgage and redeem that *one* parcel. His only right is to redeem the whole. The foreclosure of the older mortgages though not valid to cut off the younger is valid as a transfer of the rights of the older mortgagee to the purchaser or purchasers at that sale, and from them to their assignees. As the junior mortgagee or his assignee could not redeem *a single* lot out of the *several* mortgaged, from the older mortgagee, neither can he redeem a single lot from one who is the assignee of the older mortgagee, because such assignee succeeds to *all* the rights of the older mortgagee.

If a part of premises covered by a prior mortgage can be redeemed by a junior mortgagee, all the parties who purchased at the prior mortgage sale, or their grantees, and the prior mortgagees should be parties. In such case it is always a question what amount shall be paid, and the owner of every parcel covered by the prior mortgage and the plaintiff in the foreclosure suit should be before the court.

Ulster Special Term, April, 1885.

DEMURRER to complaint.

C. A. Baurhyte and R. E. Andrews, for defendant.

Beale & Beale, for plaintiff.

WESTBROOK, J.—The owner of a junior mortgage, not made a party to the foreclosure of two prior mortgages, brings this suit against the defendant, who is the owner of one piece of property covered by the *three* mortgages, which title of the defendant is *through* the sale under the prior mortgages, to redeem the one parcel. To this complaint there is a demurrer which is well taken for two reasons.

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First. There is no general rule of law or equity which permits the owner of a junior mortgage to single out *one* of several parcels covered by his and an older mortgage and redeem that *one* parcel. His only right is to redeem the whole. The foreclosure of the older mortgages though not valid to cut off the younger is valid as a transfer of the rights of the older mortgagee to the purchaser or purchasers at that sale, and from them to their assignees. The defendant holds, therefore, the one piece of property sought to be redeemed with the same rights as against the younger mortgage which the owner of the older mortgages had. As the junior mortgagee or his assignee could not redeem *a single* lot out of the *several* mortgaged from the older mortgagee, neither can he redeem a single lot from one who is the assignee of the older mortgagee because such assignee succeeds to *all* the rights of the older mortgagee. The cases cited by the plaintiff have no application. Two of them (*Hodge* agt. *Gallup*, 3 *Denio*, 527; *Dickinson* agt. *Gilliland*, 1 *Cowen*, 481) relate to redemptions by a mortgagee from a sale under a general judgment which is regulated by statute; and *Dows* agt. *Congdon* (16 *How.*, 571) simply decides that a railroad company which had acquired title to a part of premises covered by a mortgage upon which it had erected valuable improvements, was entitled to have the premises sold in the inverse order of alienation, and if the parcels which should be sold prior to that of the company did not pay the mortgage, then the company could protect itself by paying the actual value of the property *without its improvements*, which value the court would ascertain without a sale. Even the doctrine of the last case, adopted for reasons peculiar to that case, and which reasons do not exist in this, is questioned with great force by *EMOTT, J.*, when the case was before the court of appeals (28 *N. Y.*, 122, 131, 133). The permission, however, to a party to a foreclosure suit to pay his proportion of a mortgage given, because the court supposed the owner had peculiar equities entitling him to protection is a very different

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thing from allowing the owner of a junior mortgage to single out one lot in regard to which he has no special equities, from several covered by his and the prior mortgage and redeem that one lot. To make the cases at all parallel his mortgage should cover but the single lot sought to be redeemed and there should be special equities favoring it; and also all the parties having an interest in the questions involved should, as they were in *Dows agt. Congdon*, be before the court. The statement last made brings us to the second ground for sustaining the demurrer, which is:

Second. All the parties who purchased at the prior mortgage sale, or their grantees, and the prior mortgagees should be parties. If a part of premises covered by a prior mortgage can be redeemed it must always be a question what amount shall be paid? In that question the mortgagee, or if he has parted with his interests, as he has in this case, the parties who succeed thereto should be brought in. It is apparent in this case, that even though the right to redeem exists, the owner of every parcel covered by the prior mortgage, and the plaintiff in the foreclosure suit should be before the court. Without their presence the court cannot decide what sum should be paid to redeem that one lot. Even though the party is only obliged to pay the amount it brought at the foreclosure sale, in the ascertainment of that sum all have an interest and should be parties.

The defendant is entitled to judgment on the demurrer with costs, on payment of which, in twenty days, the plaintiff may serve an amended complaint.

Schroeder agt. Wanzor.

SUPREME COURT.

ERNESTINE SCHROEDER, respondent, agt MOSES G. WANZOR,
impleaded, &c., appellant.

*Cemetery lots—Deed—When cemetery lots inalienable—Complaint—
Answer—Form of denial in answer which does not put in issue material
allegations in complaint.*

Where it appeared that a certain lot in Greenwood cemetery was purchased by the husband of the plaintiff as a burial lot for herself, her husband and their family, and that it had been greatly improved, not only at his but at her expense, and their family dead had been placed in the lot as their final resting place :

Held, that these facts were sufficient to disable the husband from afterwards conveying it away to another person, and thereby devoting it to a distinct and different purpose. The plaintiff had become so far interested in the property by its improvement, and the interment of her parents as to prevent her husband from making a legal or valid sale of it. The case of *Thompson agt. Hickey* (8 Abb. N. C., 159 ; opinion by VAN VORST, J.) cited with approval.

A denial in an answer "on information and belief of all the allegations in the complaint contained not hereinbefore admitted or denied and not containing the allegation that the defendant had not sufficient knowledge or information to form a belief as to the other statements in the complaint, and for that reason he denied them, does not put in issue a material allegation of the complaint, and all such allegations will be taken as admitted.

First Department, General Term, March, 1885.

Before DAVIS P. J., BRADY and DANIELS, JJ.

APPEAL from a judgment recovered on trial at the special term.

George Bethwaine Adams, for appellant.

Sidney H. Stuart, for respondent.

DANIELS, J. — The controversy determinable by the judgment relates to the title of Moses G. Wanzor to a lot of land

Schroeder agt. Wanzor.

in Greenwood cemetery. It was purchased, and a deed taken for it from the Cemetery Association, by John Schroeder the plaintiff's husband, and he executed and delivered a deed of the same lot to the appealing defendant. The plaintiff claimed to have become so far interested in the property by its improvement, and the interment of her parents as to prevent her husband from making a legal or valid sale of it. It was alleged in the complaint that the lot had been purchased for the sole and only purpose, and as a place of burial for the dead of the family of the plaintiff and defendant, and that it had afterwards been improved by them by the expenditure of large sums of money, in caring for, beautifying and protecting the lot, and erecting a monument thereon. And that in addition to the interment of her parents, one of the sons of herself and her husband, and a brother of her husband had been interred in the lot. These allegations were not denied in the answer of her husband, neither were they in the answer of the other defendant. He did state in his answer after making specific admissions that "on information and belief he denies all the allegations in the said complaint contained not hereinbefore admitted or denied." But this statement neither denied directly the other allegations contained in the complaint, nor did it contain the allegation that the defendant had not sufficient knowledge or information to form a belief as to the other statements in the complaint, and for that reason that he denied them. And these are the only forms of denial which the Code has provided may be inserted in the answer. It has not permitted a material allegation in the complaint to be put in issue by the form of denial adopted by this defendant. He has neither made a direct denial of the other allegations in the complaint, nor averred that he had no knowledge or information sufficient to form a belief as to such statements. For that reason these allegations contained in the complaint also stand admitted as to him, and the case is to be considered and disposed of with these facts established in that manner, in favor of the plaintiff. From them it

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appears that the property was acquired as a burial lot for the plaintiff and her husband, and their family, and that it had been greatly improved, not only at his but at her expense, and their family dead had been placed in the lot as their final resting place. These facts were sufficient to prevent her husband from making such a disposition of the lot as was designed to be made in favor of the defendant, and which was to be followed by the removal of these bodies from the ground. For by the understanding that the lot was acquired as a family burial place, and it had been improved by the expenditure of money by the plaintiff with that understanding, and to beautify and adorn it, and it had been so used, her husband had disabled himself from afterwards conveying it away to another person and thereby devoting it to a distinct and different purpose

And she became entitled to the judgment which was recovered by her specifically devoting this lot of land to the object for which it had been purchased and improved. In this respect the case was brought within the principle of *Lobdell* agt. *Lobdell* (36 N. Y., 327), where a father had verbally agreed to convey a piece of land to his son in case he entered upon it and improved it. That, it is true, included the entire legal title to the land, but if such an agreement can be held valid as it then was, when it includes the legal title, by the same reasoning upon which that can be accomplished, its legality is capable of being sustained, where the agreement to be implied may include an interest less than the legal title. The same point was discussed in *Neale* agt. *Neales* (9 Wall. U. S., 1) where it was declared that "equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession and the donee, induced by the promise to give it, has made valuable improvements on the property (*Id.*, 9)." And this rule was followed in the decision of *Williston* agt. *Williston* (41 Barb., 635).

Beyond that it would be offensive to the moral sense, and therefore should not be sanctioned by the court, to permit this

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property to be made the subject of speculative disposition, after these bodies had there been buried, with permission to the purchaser to remove them from their resting place. Such an interference with them was not sanctioned by the common law (*King agt. Lynn 2 Durn. & East*, 344; *Com. agt. Cooley*, 10 *Pick.*, 37). And it was so considered in a very appropriate opinion delivered by Mr. justice VAN VORST in *Thompson agt. Hickey* (8 *Abb. N. C.*, 159). And the conclusion then and now arrived at, is in no manner impaired in its strength by the case of *Lautz agt. Buckingham* (4 *Lansing*, 484), in which neither of the controlling circumstances was presented which are included in this case. The defendant appealing will not be deprived of the money paid by him as a consideration for the deed by this determination, for as long as he may be unable to obtain the land itself he will be at liberty to recover the consideration upon a rescission of his purchase. Good order, public decency and a just regard for the repose of the remains of the dead, require, under the facts of this case, that the judgment from which the appeal has been taken, should be affirmed. And this policy has been embodied in the legislative acts of the state for the management and government of the property of rural cemetery associations. (*Laws* 1871, *chap.* 419; *Laws* 1879, *chap.* 310; *Laws* 1880, *chap.* 566, *Sec.* 1.)

The judgment should be affirmed, with costs.

The People *ex rel.* Ray agt. Davenport.

SUPREME COURT.

THE PEOPLE *ex rel.* CORDELIA RAY agt. JOHN DAVENPORT, as auditor, and LAWRENCE D. KIERNAN, as clerk to Board of Education.

New York (city of) — Colored schools — Teachers in — How to be removed — Mandamus.

By the act of 1884, chapter 248, the teachers in the colored schools, when said act was passed were continued as such teachers in the ward schools and primaries until removed in the manner provided by law.

The words "removed in the manner provided by law," mean the manner provided by the statutes relating to such removals. Those statutes provide for a removal by the board of trustees, and by the board of education, and a license of a teacher may also be revoked for any cause affecting the morality or competency of such teacher.

The act of 1884 does not warrant the dropping of a teacher under a provision of a by-law of the board of education. The clear intention of the legislature was to continue the teachers in the colored schools until they were removed for some misconduct.

New York Chambers, January, 1885.

LAWRENCE, J. — The relator is, I think, entitled to a peremptory *mandamus* in this case. Section 1 of chapter 248 of the Laws of 1884, provides that, "the colored schools in the city of New York, now existing and in operation, shall hereafter be classed and known, and be continued as ward schools and primaries, with their present teachers, unless such teachers are removed in the manner provided by law, and such schools shall be under the control and management of the school officers of the respective wards in which they are located, in the same manner and to the same extent as other wards schools, and shall be open for the education of pupils for whom admission is sought, without regard to race or color."

Section 2 repeals all acts or parts of acts inconsistent with the provisions of said act.

It is not claimed on the part of the board of education, that

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the relator has ever been removed from her position as teacher, under the provisions of the statutes providing for the organization of the board of education and prescribing the powers and duties of said board, and of the board of trustees of the several wards. The provisions in respect to such removals are contained in sections 1038 and 1042 of the consolidation act (*See Manual of the Board of Education, pp. 20, 34*). Neither is it alleged that the license of the relator has been revoked for any cause by the written certificate of the city superintendent and the written concurrence of two of the inspectors for the district for which the teacher is employed, as prescribed by section 1042 of the consolidation act (*See Manual of 1884, p. 32*). It is however alleged that, by the provisions of the act of 1884, the school to which the relator was attached became a ward school, under the provisions of the by-laws of the board of education relating to ward schools, and that by those by-laws but one teacher could be allowed for every thirty-five pupils of a grammar grade, and one for every fifty scholars of a primary grade, and that additional teachers could only be employed by the ward trustees, when authorized by the committee on teachers of the board of education. The respondents further aver, in their return, that the number of pupils returned by the principal of the school in question for the year 1883 was eighty of the grammar grade, and that the number of teachers allowed by the by-laws aforesaid was, therefore, two only, and that two teachers, in said return named being senior in rank to the relator, were assigned to the two positions of first and second assistants, as prescribed by section 35 of the by-laws of the board of education.

After examining the act of 1884, I am of the opinion that the teachers in the colored schools, when said act was passed, were continued as such teachers in the word schools and primaries until removed in the manner provided by law.

I am also of the opinion that the words "removed in the manner provided by law," mean the manner provided by the statutes relating to such removals. As already shown, those

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statutes, provide for a removal by the board of trustees, and by the board of education, and that a license of a teacher may also be revoked for any cause affecting the morality or competency of the teacher (*See secs. 1038, 1040 and 1042 of the Consolidation Act*).

In this case the relator was dropped under a provision of a by-law of the board of education, and not removed in the manner prescribed by the statute above referred to.

This procedure I do not think was warranted by the act of 1884. I think that the clear intention of the legislature was to continue the teachers in the colored schools until they were removed for some misconduct.

If there is any inconsistency between the act of 1884 and the by-laws of the board of education, the former must control, particularly in view of the fact that the act of 1884 provides that all acts or parts of acts inconsistent with the provisions of said act are hereby repealed. If the by-law of the board of education, upon which the learned counsel for the respondent relies, has the force and effect which he attributes to it, it is to my mind entirely inconsistent with the provisions of the act of 1884, respecting the "present teachers" in the colored schools.

Indeed, the effect of the by-law in question seems to me, upon the facts stated in the return, to have been rather to increase the salaries of the two teachers who were the seniors in rank to the relator, than to "remove" the relator "*in the manner provided by law*." The learned counsel for the respondents has not furnished the court with a brief in this case, and I have considered it solely upon the points necessarily presented by the return to the alternative writ. No objection was taken on the oral argument to the form of remedy, and I have, therefore, assumed that no such objection is intended to be urged.

Let an order be entered that a peremptory *mandamus* issue to the effect prayed for by the relator.

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CITY COURT OF NEW YORK.

CLARENCE M. ROOF agt. PHILIP MEYER.

Jurisdiction — City court of New York — Code of Civil Procedure, sections 815, 723, 724.

Where a judgment was recovered and entered in the city court of New York and execution issued thereon for more than \$2,000, and the excess was remitted and the judgment and execution was amended *nunc pro tunc*. On motion by a subsequent execution creditor to vacate the judgment and execution for want of jurisdiction and other alleged defects and irregularities :

Held, that the jurisdiction of this court extends to any action wherein the complaint demands judgment for a sum of money only, whatever may be the amount claimed. The amount claimed does not affect the jurisdiction of this court. If jurisdiction vests at the commencement of the action, it cannot be ousted by any subsequent act, although entry of judgment for the excess of its jurisdiction may have been an irregularity which the defendant might have objected to, a third party cannot.

There being no want of jurisdiction, if there are any defects or irregularities in the judgment, or proceedings or execution, they can be taken advantage of only by the defendant.

The alleged irregularities and informalities, may be amended or corrected by an order to be entered herein.

Special Term, February, 1885.

MOTION by Charles Doll, a subsequent execution creditor to vacate the plaintiff's judgment and execution.

HYATT, J. — It appears from the moving papers that the plaintiff had a claim against the defendant and that he brought suit thereon by serving a summons and notice on the defendant on January 23, 1885, three days prior to the commencement of the Doll action ; the judgment which was entered thereon was for more than \$2,000, but the excess was remitted and the judgment and execution amended *nunc pro tunc*. The defendant does not object to the validity of the judgment, execution and sale thereunder, nor does the moving party herein attack the same upon the ground of fraud or collusion. A subsequent judgment creditor is the only objecting party. He alleges several grounds for setting aside the pro-

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ceedings in this action; one as to the jurisdiction of the court, and the others relating to alleged defects and irregularities in the proceedings. Section 315, Code Civil Procedure, provides that the jurisdiction of this court extends to any action wherein the complaint demands judgment for a sum of money only. The language of this section is intended, as its terms show, to include any money judgment action whatever may be the amount claimed. This court has jurisdiction over all such actions. That the amount claimed does not affect the jurisdiction of this court was held in *In re Barbour* (52 How., 94); *People agt. Marine Court* (23 How., 447). If jurisdiction vests at the commencement of the action, it cannot be ousted by any subsequent act (*Koppel agt. Heindricks*, 1 Barb., 449; *McAdam's Marine Ct. Pr.* [2d ed.], 36). Jurisdiction having been thus acquired in this action regularly, all subsequent proceedings can be, at most merely irregular, and errors and irregularities may be disregarded or amended. The court cannot be ousted of jurisdiction. The court having jurisdiction, its judgment is not void, as between the parties, and *a fortiori* as to third parties. Entry of judgment for the excess of its jurisdiction may have been an irregularity, which the defendant might have objected to, a third party cannot.

Section 1245 of the New York Consolidation Act, provides that any portion of a claim may be remitted in this court. There being no want of jurisdiction in the case at bar, if there are any defects or irregularities in the judgment or proceedings or execution, they can be taken advantage of only by the defendant. In the conceded absence of fraud, there being no want of jurisdiction, a subsequent execution creditor has no standing in court for the purposes of this motion (*Gere agt. Gundlach*, 57 Barb., 13). The alleged irregularities and informalities may be amended or corrected by an order to be entered herein (*Code Civil Pro*, secs. 723, 724).

The motion to vacate the judgment is denied, with ten dollars costs, and the stay of proceedings vacated.

NOTE. — Affirmed March General Term. — [Ed.]

Briggs agt. "The Titan."

U. S. CIRCUIT.

FREALON BRIGGS agt. "THE TITAN" and JOHN H. STARRIN
and "THE HILLS."

*Negligence — Obscured lights — Look-out — Speed — Fellow servant — Pilot not
a fellow-servant of a deck hand.*

The pilot and the deck hand were not fellow-servants.

When a tow hides a light on a tug, the tug is liable.

The "Hills" is liable also for excess in speed and for not having a look-out.

Both parties being to blame, neither may claim to be excused by the others
and the decree of the district court giving \$3,000 damages, one-half
against the "Hills" and one-half against "The Titan" to the libel-
ant, Briggs, is affirmed.

Southern District of New York, February, 1885.

THE district court waived the point as to whether the deck
hand was a fellow-servant on "The Titan," but held as "The
Titan" was in fault and "The Hills" was also in fault, "The
Titan" had a right to claim an apportionment of the damages
on "The Hills."

Peckham & Tyler, for the libelant Briggs.

E. D. McCarty and P. C. Cantine, for "The Titan."

Owen & Gray, for "The Hills."

WALLACE, J. — Upon the proofs it seems perfectly clear
that both the Titan and the Hills were in fault for the colli-
sion, by reason of which the libelant was injured. The
collision took place about seven o'clock in the evening of
September 22, 1882, in the Hudson river, about 1,000 feet
out from the Jersey shore, somewhat above the Pavonia
ferry slip. The tide was ebb, running about three miles an
hour. The wind was light and the night was gray, but fairly
clear. The Titan was proceeding up the river bound for

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Hoboken, against the tide, at a speed of about four miles an hour on a line with the westerly shore, but heading in somewhat towards the shore, towing the float Mohawk, which was heavily loaded with two rows of railway cars and was lashed to her starboard side. The float, as lashed, projected some twenty feet beyond the bow of the Titan and had an umbrella or shed roof, which slopes on each side to within about six inches of the top of the cars. This umbrella obscured the green light on the starboard side of the Titan, so that it did not show an uniform and unbroken light from right ahead to two points abaft the beam on the starboard side and there was no green light on the starboard side of the float. "The Hills" had left the New York side at 23d street, bound for Jersey City, light, and proceeded on her course down the river and bearing to the westward at a speed of about fifteen knots with the tide. She had no lookout but her pilot, who was acting at the time as master and was at the wheel in the pilot house, saw the Titan when nearly half a mile away. He was able to see the vertical white lights of the Titan and the white light of the float, but was unable to see the green light of the tug, because it was obscured from view by the cars and the umbrella of the float. Not seeing the green light he assumed the tug and float were going down the river and kept rapidly approaching them at full speed. Soon after seeing the tug and float he observed the ferry-boat Gould, which had left her ferry at Hoboken and was coming by the westward of the Titan about 150 feet away and passed across the Titan's bow, but as he supposed across her stern. The Gould gave a signal of two whistles to the Hills and the Hills responded by a like signal. The Titan supposing the signal of the Hills in answer to the Gould was a signal to herself, answered the Hills signal with two whistles, but the pilot of the Hills supposed these were a signal to the Gould. The Hills starboarded somewhat for the Gould and passed her on her port side a couple of hundred feet away, and that her pilot when within a hundred feet of the Titan, still assuming

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that the Titan was going down the river and seeing that a collision with her was imminent, hard-ported his wheel to go under her stern. The result was that the Hills came into collision with the bow of the float, and the shock was so severe that the libellant, who was on the Hills, was thrown down and his skull was fractured. The Hills could have avoided the collision with proper effort at the time she came abreast the Gould, being then about a hundred yards away from the Titan. She maintained her full speed from the time her pilot first saw the Titan until the time of the collision. If the pilot in charge of the Hills was warranted in assuming that the Titan was going down the river, as he was overtaking and intending to pass her, he assumed the responsibility of passing her safely, and unless he allowed ample distance for the purpose he was bound to slacken speed and if need be to reverse in order to avoid collision. In this behalf it was his duty to maintain a diligent observation in order to govern himself as circumstances might require. Instead of doing this he found his vessel within one hundred feet of the Titan bearing upon her float amidship, and sought to save a collision by the manœuvre *in extremis* of hard-porting his wheel. For a distance of nearly half a mile his view was unobscured except for the brief interval when the Gould was between him and the Titan. Probably he relied upon his first observation when he concluded the Titan was going down the river, and relying upon this permitted his attention to be distracted by watching the Gould. Undoubtedly the appearance of the Titan and the float with their vertical white lights apparently in a cluster while the vessels were approaching each other, with no back ground by which to determine readily in which direction the lights were moving, and no green or red light to indicate that she was approaching, was well calculated to mislead the pilot of the Hills. But it seems impossible to believe that the real situation would not have been discovered if proper diligence had been exercised. The Hills should be held in fault for not having a look-out. It is only when a

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look-out would have been of no service in guarding against a collision that his absence can be excused. The situation here was peculiarly one in which the observation and judgment of a look-out might have been useful. It was one of these doubtful situations in which different points of observation might suggest different conclusions, and in which two men might form a different opinion from the same standpoint. There was enough in the rapidity with which the vessels were approaching each other, to attract attention and suggest a probability that they were not going in the same direction.

The Hills was also in fault for pursuing such a high rate of speed at night, and with the tide, upon waters customarily traversed by numerous vessels, when she was rapidly nearing a tow. The situation required a high degree of vigilance and circumspection, yet she disregarded every rule of prudent navigation in reliance upon the hypothesis which might be erroneous, and proved to be so. While ordinarily a vessel has a right to assume that another vessel is not derelict in the observance of the rules of navigation, this presumption is not to be carried so far as to exonerate her from ordinary precautions on her own part, or to excuse her from the consequence of a mistake when by slight exertion and without any peril to herself or to other vessels she could certainly avoid hazard. There was ample room, plenty of time and no intervening obstacle in the way of perfect safety if the Hills had slackened speed while she was passing the Gould. After this it was obvious that the danger of collision with the Titan was imminent and she should have been stopped and reversed. Instead of doing this the pilot took the chances of a manœuvre which could only be justified by the certainty that he was correct in supposing the Titan was going away from him. The Titan was in fault for so locating her starboard light that it was not visible as required by the rules. No doubt is entertained that it was obscured by the umbrella of the float and by the cars on the float forward of the place on the tug where it was located so that it was not visible to the pilot of the Hills.

 Matter of Martin.

The rule requiring lights may as well be disregarded altogether as to be only partially complied with and in a way which fails to be of any real service in indicating to another vessel the position and course of the one carrying them.

The libelant was a deck hand upon the Hills, but was not at the time on duty and had no part in her navigation. The pilot was in command, within the case of *Chicago, &c., Railroad Company* agt. *Ross*, decided recently by the supreme court; he was not a fellow servant of the libelant and the latter is entitled to recover for the injuries he sustained by the collision against the Hills as well as the Titan. Treating the pilot as the master he was responsible for the management and navigation of his vessel. He was negligent in failing to have a lookout stationed where he ought to have been, and negligent otherwise. The collision was solely the result of his negligence and the libelant had no part or lot in it.

The decree of district court is affirmed, with interest and costs of appeal.

SUPREME COURT.

In the Matter of HORATIO A. MARTIN.

Security for costs — A person suing in the name of the overseer of the poor, for a violation of the excise law, cannot be required to give security for costs — Section 3271 of the Code of Civil Procedure does not apply — Jurisdiction — Supreme court no jurisdiction by a mere notice of motion to make an order in an action pending in a justice's court.

A person who brings an action in the name of the overseer of the poor under chapter 628 of the Laws of 1857, as amended by chapter 820 of the Laws of 1878, to recover penalties for a violation of the excise law cannot be required to file security for costs under section 3271 of the Code of Civil Procedure.

Section 3271 does not apply (*Sharp* agt. *Fancher*, 29 Hun. 193, criticised and not followed; *Board of Commissioners of Excise* agt. *McGrath*, 27 Hun. 425, followed).

Matter of Martin.

The supreme court cannot obtain jurisdiction to make an order in an action pending in a justice's court, by a mere notice of motion.

A party to an action pending in justices' court, cannot make a motion in the supreme court to control the procedure in such action.

Ulster Special Term, March, 1885.

APPLICATION to compel one Luzerne J. Smalling, who is prosecuting the petitioner before a justice of the peace of the town of Windham, Greene county, in the name of the overseers of the poor of such town, for violations of the excise law, to give security for costs.

D. H. Daley, for motion.

Gideon Hill, opposed.

WESTBROOK, J. — Chapter 628 of the Laws of 1857, as amended by chapter 820 of the Laws of 1873 (3 R. S. [7th. ed.], 1985, sec. 30), and which is the act to regulate the sale of intoxicating drinks, provides, "in case the parties or persons whose duty it is to prosecute for any penalty imposed for any violation of the provisions of this act shall, for the period of ten days after complaint to them that any person has incurred such penalty, accompanied with reasonable proof of the same, neglect or refuse to prosecute for such penalty, any other person may prosecute therefor, in the name of the overseers of the poor of the town in which such alleged penalty was incurred, and in the manner provided by section 22 of this act as the same is amended by section 1 of this chapter."

One Luzerne J. Smalling has commenced an action under the clause quoted against the petitioner, Horatio A. Martin, to recover penalties for alleged violations of the excise law in the name of the overseers of the poor of the town of Windham, before a justice of the peace of such town.

The defendant in such action by petition asks that said Smalling may be compelled to give security for the costs of such action.

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The motion should be denied for the following reasons:

First. Notwithstanding the decision of the general term in this department, in *Sharp agt. Fancher* (29 *Hun*, 193), I should be exceedingly loathe to hold that section 3271 of the Code of Civil Procedure applies to a person who prosecutes to recover penalties in the name of the overseers of the poor incurred by violation of the excise act. That section authorizes the court in its discretion to "require the *plaintiff* to give security for costs" "in an action brought by or against * * * a person expressly authorized by statute to *sue* or to *be sued*." It is true the court in the case mentioned, which was an action similar in all respects to the one now sought to be restrained, say that the section referred to does cover an action of this character, because it "could not be brought except by the express authority of the statute," but the reason is based upon a part, and not upon all the words of the section. It will not be disputed that a statute gives the action, and that there is "no common-law liability" apart from such statute, but in the case referred to, and also in this, there neither was nor is a motion to "require *the plaintiff* to give security for costs," as provided by the section of the Code already quoted. The decision in the reported case was, as this is, upon a motion by the defendant in an action to compel a *person* authorized to sue in the name of the plaintiffs to give security for costs. For that relief in such an action no provision is made by the section. It simply provides that "in an action brought *by* or against * * * a *person* expressly authorized by statute to *sue* or to *be sued* * * * the court may in its discretion require *the plaintiff* to give security for costs." This language would certainly seem to be unmistakable. A statute which authorizes a person "to *sue* or to *be sued*" confers only authority to become plaintiff or defendant in an action, and gives no right to bring suit in the name of another; and the power to require "*the plaintiff*" in an action "to give security for costs" does not reach the case of an individual who is authorized not to become a plaintiff, *i. e.*, "to *sue*," but to

Matter of Martin.

prosecute in the names of certain officers for penalties given to such officers, and for which such officers have neglected to prosecute; and lastly, the provision in the excise act which authorizes municipal *officers to sue* in their official capacity and by their official titles is not a statute conferring upon "*a person*" the right to sue, which it must be, if section 3271 of the Code is to be made applicable to them. In such an action in which the municipality is liable for costs, any requirement compelling the officer to give security for costs would be worse than useless because it would be a hindrance to the discharge of official duty.

It is also difficult to say, even though this motion was made in behalf of the overseers of the poor, upon what principle a court can require a party, who is using the name of the overseers of the poor as plaintiffs precisely as a statute authorizes to give security for costs. The statute giving the right thus to prosecute has imposed no such restriction, and because it has not "it would seem to follow," as DANIELS, J., said in *Commissioners of Excise agt. McGrath* (27 Hun, 425), "that he could not be required to give security for costs."

The views just stated are submitted to the general term if the question shall there be again presented. If this motion involved no other question than that which has been discussed the decision in *Sharp agt. Fancher* would probably control my action, although for the reasons given it seems to me to be erroneous.

Second. The action in which the order is sought is pending in justices' court, and this court cannot obtain jurisdiction to make any order in that action by a mere notice of motion. It is true that this court can, where it has jurisdiction over parties by an action duly brought therein, under section 818 of the Code of Civil Procedure, "by order remove to itself" an action "pending in another court," and may "consolidate" that pending in another court "with that in the supreme court," but a party to an action pending in justices' court cannot make a motion in the supreme court to control the

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procedure in such action, any more than a party to a suit in any court of record other than the supreme court can make a motion in the latter to control the practice in the former.

Third. The defendant does not need the security for costs which he seeks. He has responsible parties to the record as plaintiffs who are liable to him for costs if the action fails, and the opposing affidavits show that the party prosecuting in the name of the overseers, is pecuniarily responsible.

The motion must be denied, with ten dollars costs.

COURT OF APPEALS.

CHARLES C. MOTEL, an infant, etc., respondent, agt. THE SIXTH AVENUE RAILROAD COMPANY, appellant.

Negligence—What amounts to contributory negligence in a child eight years old.

An infant, if *sui juris*, after he sees the approach of a car in time to avoid it, cannot voluntarily assume the risk attending an effort to cross a railroad track and recover for an injury arising from the failure of his experiment.

Decided April 27, 1885.

PLAINTIFF recovered a verdict against the defendant for \$10,000, and on appeal to the general term of the court of common pleas the judgment was affirmed. Judge BEACH wrote the following dissenting opinion:

BEACH, J.—I cannot agree with the conclusion of my learned brethren. The plaintiff was eight years old, had often crossed Sixth avenue, and was chargeable with the exercise of caution commensurate with his age. From his own narration, he was about to cross between Fifty-third and Fifty-fourth streets, from east to west, with one foot on the east rail of east track; he heard the bell and saw the car advancing very fast, nine feet and nine inches from him. In this situation, by withdrawing one foot from off the rail, no harm could reach him. The opinion prompting what he did is thrice expressed in his testimony. In answer to the court:

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"I tried to get across; I thought I could get across before the horses hit me."

"By the COURT—Where were you when you first saw the horses? Ans. I just put my foot on the track and then I heard the bell ringing, and I turned around and I tried to get across, but I couldn't."

"By the COURT—And, after you heard the bell, didn't you know it was dangerous to try to go across before the car passed? Ans. I thought I would try to get across."

No evidence on part of plaintiff changed the facts above recited, and manifestly could not, relative to the time he first saw the car and the action of his mind. The plaintiff was walking, and in no situation forcing a sudden decision.

It seems to me reasonable minds could not differ, and must draw like conclusions from this narrative. The boy, familiar with the danger, voluntarily assumed the risk attending an effort to cross. He, unfortunately, failed, but resulting calamity should not be charged against the railroad company. Those who travel the streets, if observant, see frequent instances of persons attempting to cross, with advancing vehicles in full sight, rather than await their passing. There is no more reason for holding one free from contributory negligence whose experiment fails than if he jumped from a moving car because he thought it could be done in safety. In my opinion, the court below should have granted the motion to dismiss the complaint.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

The defendant appealed to the court of appeals.

O. E. Bright, for respondent.

D. M. Porter, for appellant.

By the COURT—Judgment reversed, new trial granted, costs to abide the event, on foregoing opinion of BEACH, J., in court below.

All concur, except DANFORTH, J., dissenting.

Goldsmith agt. Union Mutual Life Insurance Company.

SUPREME COURT.

DANIEL GOLDSMITH agt. THE UNION MUTUAL LIFE INSURANCE COMPANY, and LINA MANLY.

Insurance — Divorce — Husband and wife — Effect of the divorce of a wife for adultery upon a policy of life insurance taken out for her benefit by her husband.

In an action by a husband to reform life insurance policies taken out in favor of his wife, from whom he has since been divorced, on the ground of mistake:

Held, that to justify a reformation the mistake must have been mutual. The divorce from his wife cannot authorize or enable the court to change the conditions and terms of the policies, unless, through a mutual mistake, the intention of both parties have failed of expression. A mistake on one side is not enough.

As the husband accepted these policies at the time they were issued, and has had them in his possession for many years without objection, they are presumed in law to express his intentions. If for any reason he believed them to be wrong, he should have declined to pay the premiums upon them year after year. Such voluntary payments are an adoption of the terms of the policies as issued.

As to the effect of the decree of divorce upon the rights of the divorced wife under the policies, *quære*.

Special Term, April, 1885.

ACTION to reform policies of life insurance.

Marsh, Wilson & Wallis, for plaintiff.

Merritt E. Sawyer, for the company.

W. L. Butler, for defendant Lina Manly.

VAN VORST, J. — In May, 1875, the plaintiff, who was then the husband of the defendant Lina Manly, took out two policies of insurance in the defendant company upon his own life, one for \$10,000 and the other for \$5,000. By these policies the defendant company agreed to insure the life of the plaintiff in the amount named, "for the sole and separate

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use and benefit of his wife, Lina Goldsmith, but in case of her previous death to revert to the insured." The plaintiff paid with his own funds the sum necessary to meet the premiums on the policies, and continued such payments thereafter down to the time he obtained a decree of divorce dissolving the marriage bond, on account of the adultery of his wife. He has always held the policies in his possession. The plaintiff's wife knew of these policies after they were issued.

The plaintiff brings this action to obtain a reformation of these policies. In his complaint he asks that they be reformed by inserting therein a provision to the effect "that in case the said Lina Goldsmith should cease to be the wife of the plaintiff during his lifetime, and the marriage between her and the plaintiff should be dissolved by reason of her adultery, then and in such case the benefit of the policies should revert to the said plaintiff."

The plaintiff alleges in his complaint that it was not his intention, in taking out such policies, to contract with the defendant company that any loss which might accrue thereon should be paid to the said Lina Manly, unless she should be his wife at the time of his death, but that through the mutual mistake and inadvertence on his part and that of the company their common intention in that regard was not fully expressed.

Whatever may have been the intention of the plaintiff in this regard, it cannot avail him to effect his present purpose, unless it was stated to the company when the policies were agreed to be issued. An undisclosed intention is no intention in this connection. There is no claim of fraud. The ground upon which this relief is asked is that of a mistake. To justify a reformation the mistake must be mutual. The divorce from his wife cannot authorize or enable the court to change the conditions and terms of these policies, unless through a mutual mistake the intention of both parties have failed of expression. A mistake on one side is not enough. The applications of the plaintiff in writing, made to the company,

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do not express any such intention. The evidence adduced upon the trial does not show that he disclosed to the agent of the company, at the time he made his application for the policies, the intention which he now alleges was then in his mind. His directions, he says, were "general," and the language was formulated by the agent.

As the plaintiff accepted these policies at the time they were issued, and has had them in his possession for many years without objection, they are presumed in law to express his intentions. If for any reason he believed them to be wrong, he should have declined to pay the premiums upon them year after year. Such voluntary payments are an adoption of the terms of the policies as issued.

Nor is it at all probable that the idea that his wife, for whose benefit he was insuring his life, would, through a criminal act, forfeit all claims upon him as a husband was present to his mind. If plaintiff had supposed that she might become so guilty it is not likely that he would have insured his life for her sole advantage.

The husband of a divorced wife can omit to pay the premiums on any insurance he may have taken for her benefit, and thus end his obligation under the policy. He cannot be obliged to keep it alive for one who has forfeited all claim upon him. He might thereafter regard it in the light of a wager policy. It is not necessary to determine the effect of the decree of divorce upon the rights of the divorced wife under the policies. A decree of divorce would not disturb vested rights or executed gifts and contracts. I do not say that these policies are in the category of such rights or interests.

All that it is now necessary to decide is that there is no such evidence of mutual mistake as will justify the court in changing the terms and conditions of these policies in the manner in which we are asked to do.

The construction of the contracts, and the rights of the parties thereunder, and the effect of the decree of divorce

Turno agt. Parks *et al.*

upon those rights, will be determined when a claim is legally made under them at the time the insurance is payable.

For these reasons the plaintiff's complaint must be dismissed.

As to the defendant, Lina Manly, the dismissal is without costs. As to the company, I will hear the counsel on the subject of costs.

NEW YORK CITY COURT.

CHARLES TURNO, Jr., agt. CHARLES T. PARKS *et al.*

Judgment—Set-off—Effect of prior assignment of judgment—Attorney's lien.

The taxable costs in an action are not subject to set-off.

An attorney has a lien for his services in a particular case, as a mechanic would upon the product of his labor, and equity intervenes to save it for him, but this lien would ordinarily be measured by his taxable costs, but might embrace a further fee, and will not always be limited to such costs if a special contract had been made in good faith between the client and his attorney, but, *it seems*, it must refer to his services in the particular action.

Where prior to the recovery of the judgment the plaintiff assigned to his attorney herein all his interest in the cause of action in payment for services in the suit of Parks agt. Turno, and also for money loaned, and the attorney held this assignment prior to the recovery of judgment, and due notice was given the defendants:

Held, that the equity of the attorney is superior to that of the plaintiff, and no right of set-off exists.

Special Term, April, 1885.

HAWES, J. — It seems quite difficult to determine the present rule of law governing this case. Whether a judgment for costs, or so much of it as may embrace costs, is subject to set-off in case of the insolvency of the party would seem to be questionable, and still more so in a case like the present, where the attorney claims to hold an assignment of the entire claim prior to the recovery. Upon the

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first question the court of common pleas, at general term, in *Saunders agt. Gillette* (8 *Daly*, 184), expressly holds that the lien of the attorney is subject to the equitable right of set-off between the parties. It has been since held, however, by the same court that the costs belong to the attorney, and his right to them cannot be taken away by a set-off (*See Hilton agt. Sinsheimer*, ALLEN, J., *Daily Register*, March 27, 1885). The superior court, at general term (*Naylor agt. Lane*, 5 *Civil Pro. Rep.*, 150), declares the lien of the attorney to be an equitable assignment of the judgment to him, and not subject to set-off, and that no notice to the other side is necessary to protect his rights. The supreme court in this department would seem to hold a contrary doctrine in the case of *Garner agt. Gladwin* (12 *Weekly Digest*, 10), where it was held that the right to set-off depended upon whether there was or was not an assignment in fact from the party to his attorney. This would clearly seem to negative the proposition that they were not inherently subject to set-off by reason of being costs which the attorney could claim as a matter of legal right.

The court of appeals, in *Davidson agt. Alfaro* (80 *N. Y.*, 660), declined to pass upon the question, stating that "it does not seem as clear from the decisions as it ought to be how far this right of lien will stand in the way of a set-off sought in an equitable action;" but as the court below recognized this lien, so far as taxable costs are concerned, as not subject to the right of set-off, it is fairly inferable from the context that the court assented to the doctrine there enunciated. The case of *Perry agt. Chester* (53 *N. Y.*, 241); *Zogbaum agt. Parker* (55 *N. Y.*, 120), clearly support this view, and I think it must be held that the taxable costs are not subject to set-off. This, of course, does not exist by reason of any legal right, for in law this lien would be disregarded in an action to compel set-off (2 *Robt.*, 670), but is discretionary, as is suggested in *Perry agt. Chester* (*supra*), and the courts equitably interfere to protect the attorney's

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interests ; but these interests are protected not because the costs belong to the attorney, as is frequently suggested, but because the courts will in equity preserve to the plaintiff or defendant, as the case may be, so much of the judgment as the lien attaches to. It is true that this is for the protection and benefit of the attorney who, as an officer of the court, claims special consideration, but it is purely incidental, and does not arise by reason of any ownership by him of the costs. He doubtless has a lien for his services in this particular case, as a mechanic would upon the product of his labor and equity intervenes to save it for him, but this lien would ordinarily be measured by his taxable costs, although I am inclined to think that it might embrace a further fee, and would not always be limited to such costs if a special contract had been made in good faith between the client and his attorney, but it must, I think, refer to his services in this particular action, and the reason of such distinction would seem to be based upon the analogous principle above referred to. It seems clear, therefore, that the taxable costs of the plaintiff in this action will not be subject to set-off, and to that extent at least the motion will be denied.

It is further claimed, however, by the plaintiff that prior to the recovery of the judgment the plaintiff assigned to his attorney herein all his interests in the cause of action, in payment for services in the suit of *Parks agt. Turno*, and also for money loaned, and that as the attorney held this assignment prior to the recovery of judgment no right of set-off exists, as the judgment and all its incidents belonged to the attorney, of which due notice was given the defendants herein. There seems to be no question as to the *bona fides* of this assignment, the consideration was ample and the claim was admittedly assignable. The legal title was in the attorney, and I do not see how it can be defeated, unless exceptional equities exist between the parties. If these existed at the time of the transfer it is clear that they must prevail now, as the assignee held no higher rights than his assignor.

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Under the ruling in *Davidson* agt. *Alfaro* (*supra*), it must be held that if both actions grow out of the same contract, and the party is insolvent, his assignee, with knowledge of these facts, takes subject to an existing equity, and a set-off under such circumstances will be allowed as against the party holding the legal title. The rule applicable to such a state of facts does not prevail in the case at bar, for although not disconnected, they cannot be said to grow out of the same contract under the restrictions which govern that class of cases.

The equity of the attorney is superior to that of the plaintiff, and the case falls within *Perry* agt. *Chester* (*supra*), *Zogbaum* agt. *Parker* (*supra*), and *Prouty* agt. *Swift* (10 Hun, 232).

Motion denied, with costs.

SURROGATE'S COURT.

In the Estate of TUNIS COOPER, deceased.

Surrogate — Jurisdiction — Reference — When order of reference and proceedings thereunder should not be vacated upon motion of a party who had consented thereto — when clerk or other person employed in the surrogate's office competent to act as referee — stenographer of surrogate's court not within the scope of sections 90 or 2511 of the Code of Civil Procedure.

In a proceeding for the revocation of probate all necessary parties, including the infant son of the decedent, were duly served with citation.

No application was made for the appointment of a special guardian for such infant and none was appointed, but all the parties who appeared, consented to the entry of an order directing the stenographer of the surrogate's court to take testimony as a referee. The trial proceeded before such referee, and, at its conclusion, the evidence was submitted to the surrogate, who decided that the probate should be revoked. The entry of a decree upon that decision being opposed by the respondents, and it being contended that the order of reference was without authority and that all proceedings subsequent thereto were void :

Held, that the order of reference and the proceedings thereunder should

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not be vacated upon the motion of any party who had consented to its entry and to the submission of its results to the surrogate for his determination.

Held, also, that a special guardian should be appointed to represent the infant, and to ascertain and report whether it would be for the best interests of the infant that the proceedings should stand as theretofore conducted, and a decree be entered accordingly, or that the trial should be commenced *de novo*.

Held, also, that in view of section 3355 of the Code, sections 90 and 2511 must be construed as if they had simultaneously become law, and that so construed, "a clerk or other person employed in the surrogate's office" is competent to act as referee, in a proceeding pending in the surrogate's court, provided he is appointed with the written consent of all the parties appearing.

Held, also, that the stenographer of the surrogate's court is not within the scope of section 90 or of section 2511.

New York County, April, 1855.

ROLLINS, S. — A paper purporting to be the will of this decedent, was admitted to probate as such in May, 1881. In April, 1882, a proceeding was commenced for revocation of such probate. Citations were duly issued and duly served upon all necessary parties, and, with the consent of all who appeared and took part in the subsequent trial, Edward F. Underhill, esq., was appointed referee to take testimony and report the same to the surrogate. Mr. Underhill proceeded with the examination of such witnesses as were brought before him by the contending parties, and a large volume of evidence was subsequently submitted for my consideration. In July of last year I rendered a decision granting the petition for revocation. No decree, however, has as yet been entered.

My attention is now called to the fact that decedent's infant son has hitherto had no special guardian to represent him and protect his interests. The alleged will names his mother, the widow of the decedent, as its executrix, and also as one of its chief beneficiaries. The widow and her co-executor protest that no decree should be entered, and that, because of the failure to

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appoint a special guardian for the infant, the order of reference and all subsequent proceedings were unauthorized, and should now be set aside. Such a course would involve much expense and long delay in settling the affairs of this estate. It is for that reason greatly to be deprecated, and should not be pursued unless it is absolutely unavoidable. May it not be avoided?

It is clear that, by the service of citation upon all the necessary parties to this proceeding, including the infant, this court acquired jurisdiction of the proceeding and of all parties thereto (*In Estate of Fenn, Daily Register, March 20, 1885, and cases cited*). Any decree, therefore, that might be entered, even while the infant was still unrepresented, would not be absolutely void, but would merely be voidable at the infant's instance (*McMurray agt. McMurray, 41 How. Pr., 41; 66 N. Y., 177; Matter of Becker, 28 Hun, 207; Boylan agt. McAvoy, 29 How. Pr., 279*). Nevertheless, these petitioners, being named as executors in the disputed paper, and having duly qualified as such, are justified in insisting upon such a disposition of this controversy as shall be conclusive upon all persons interested therein. Now, I do not think that, to accomplish this result, it is essential that I should at once, and without ascertaining whether or not such a course would be advantageous for the infant, set aside all the proceedings since and including the entry of the order of reference. If, upon inquiry properly instituted for that purpose, it shall appear that the best interests of the infant demand that these proceedings shall stand, it will, in my judgment, be the duty of the surrogate to make decree in conformity with his recent decision.

It is insisted, by counsel for the respondents, that the entry of the order of reference herein was unauthorized, in view of the limitations upon the surrogate's authority that are established by section 2546 of the Code of Civil Procedure. That section declares that an appointment of a referee may be made "on the written consent of all the parties appearing."

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Such consent, in the present case, was given by the petitioners and the respondents; and I must certainly refuse to toss aside as worthless the testimony taken in pursuance of that consent until I am asked to do so by somebody who was not a party to it (*Musgrove agt. Lusk*, 2 *Tenn. Ch.*, 576). If the special guardian whom I shall appoint to represent the infant shall see fit to raise this objection, it will be again considered.

It is also urged by counsel for the respondents that the referee herein was disqualified from holding that office by reason of his being the stenographer of the surrogate's court. This objection is somewhat ungracious, for counsel does not claim that at the time he consented to Mr. Underhill's appointment he was ignorant either of the fact that the appointee was the court stenographer, or of the statute which claimed to work the disqualification. But it is no more ungracious than it is unsound. In view of section 3355 of the Code, sections 90 and 2511 must be construed as if they had simultaneously become law, and so construed they simply forbid the appointment of "a clerk or other person employed," &c., except upon the written consent of all the parties (*Estate of Thorn*, 4 *Mo. Law Bul.*, 48). And besides, I am of the opinion that the stenographer does not have such a relation to the surrogate's court or office as to bring him within the scope of either section 90 or section 2511 (*See sections 2508 and 2512*).

All in all, the disposition which the court shall make of this whole matter must be governed entirely by what, upon investigation, shall appear to be most advantageous for the infant (*Bowen agt. Idley*, 1 *Edw. Ch.*, 148; *Croghan agt. Livingston*, 17 *N. Y.*, 223; *Fulton agt. Roosevelt*, 1 *Paige*, 178; *Levy agt. Levy*, 3 *Madd.*, 245).

If it shall appear that the infant's share in his father's estate is greater in the contingency of his father's intestacy than in that of the final establishment of the disputed paper as his will — and I am inclined to think that such is the case — then further litigation may be wisely avoided.

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A special guardian will be appointed to ascertain and protect the interests of the infant ; and as his interests and those of his mother are or may be adverse, the surrogate will appoint such special guardian of his own motion after due notice to the infant (*In Estate of Fenn, supra*).

SUPREME COURT.

EUGENE VAN RENSSELAER and others agt. THE CITY OF
ALBANY.

Municipal corporation — No right to construct sewers and discharge them upon the premises of an individual — Injunction — Right to.

A municipal corporation has no right, by the grading of streets and the construction of sewers, to gather the surface water and sewage from a considerable territory, and through a sewer discharge them upon the premises of an individual.

The casting upon the premises of such individual of the filth from such sewers is a nuisance, and the municipality is liable therefor and can be called upon to abate it.

There can be no dedication of land while the owners are continually declaring a contrary intent, nor can a right to continue a nuisance be established by user because no user will legalize a nuisance.

Ulster Special Term, March, 1885.

APPLICATION by plaintiffs for an injunction.

L. G. Hun, for plaintiffs.

S. W. Rosendale, for defendant.

WESTBROOK, J.—The case of the plaintiffs may be thus briefly stated : The defendant, by the grading of streets and the construction of sewers, gathers the surface water and the sewage from a considerable territory, and through a sewer discharges them upon the premises of the plaintiffs. The plaintiffs ask that defendant be enjoined from continuing the

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discharge and deposit of the filth of a city neighborhood upon their property.

In *Noonan agt. The City of Albany*, which was an action to recover damages for perpetrating a similar nuisance upon the lands of the plaintiff situated in the same locality with those of the present plaintiffs, and tried at the Albany circuit, held in March, 1878, by the judge writing this opinion, it was upon the trial decided that the city of Albany was liable for the injury done to the property of the plaintiff in that action by the emptying upon it of water and sewage by means of the identical sewer and grading of which the plaintiffs in the present action complain. The recovery of \$1,500 as damages by the plaintiff in that action was sustained both at general term and in the court of appeals (79 *N. Y.*, 470). In the latter court (*page* 478) it was said: "The casting on the plaintiffs premises of the filth from the sewers was a nuisance, and the defendant was bound to abate it." As this remark was made of and concerning the same sewers and grading of which the present plaintiffs complain, the defendant is liable to them also for the same "nuisance," and can by them likewise be called upon "to abate it" unless there is some reason which takes this case out of the rule laid down in the other.

The counsel for the defendant claims that there has been a dedication of the lands of the plaintiffs to the public for the purpose of depositing filth and sewage, and that they have expressly assented to the acts complained of by paying an assessment for the construction of a sewer which assists in the emptying of sewage upon their land. The dedication consists in the ownership of lands which are so situated as to receive the water and sewage the defendant casts upon it. The complaint avers, and this fact is undenied, that the plaintiffs have again and again protested to the defendant against its acts, of which they now complain, but have not until now brought an action to recover compensation for, or to restrain the nuisance which their papers in this case show. It would be difficult to find a dedication of land for the maintenance of a nuisance,

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if such a thing be possible, while the owners are continually declaring a contrary intent; and it would be equally difficult to establish the right to continue a nuisance by user because no user will legalize a nuisance, and also because the acts which plaintiffs allege principally caused the injuries — the grading of Colonie street and the construction of the sewer in Lark street, with which other sewers or drains were subsequently connected — were committed during, and subsequent to, the year 1871, a period of less than twenty years. As to the payment of an assessment by the plaintiffs to construct a sewer, which the defendant had a right to construct and which the plaintiffs had reason to suppose would be emptied when completed where it would be lawful to empty it, it is not seen how that can be tortured into an assent by the plaintiffs to the commission of a wrong upon them by the defendant.

It was also contended by the defendant that because many of the owners of the premises, which are drained upon the plaintiffs' lands, hold under deeds derived from the plaintiffs or their ancestors, the natural flowage from which premises are upon those of the plaintiffs, therefore the defendant may empty the sewers which drain those, and also other premises, upon the plaintiffs'. It is difficult to see how the rights of other individuals to do acts upon the lands of the plaintiffs can aid the defendant to do that which it has no right to do; and it cannot be held to be the law that, because the grantee of premises has by necessity a right of drainage through those of his grantor, or to permit a natural flowage from his premises upon those of his grantor, that such right covers and includes the privilege of gathering into an artificial sluiceway or sewer all the filth and nastiness of his own premises, and discharging and emptying it in one great volume upon the land of his grantor. The right of drainage by and through a pipe or sewer, over or across one's premises, or to allow water to flow in its natural and usual channels upon it is one thing, and the right of deposit *upon* the same premises, of filth through an artificial channel constructed for that purpose, so

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as to create and maintain a nuisance thereon is quite a different thing. It is of the latter and not of the former of which the plaintiffs complain; and they complain not against those who suppose they have rights derived from them, but against a municipality which has neither direct nor implied authority to do what is sought to be enjoined.

The plaintiffs are clearly entitled to their temporary injunction, but as the granting thereof, to take effect immediately, would work serious injury to the public, it will issue to take effect upon a future day to be designated in the order.

Obviously, the defendant should extend its sewers so as to carry their discharge to a proper place of deposit. The maintenance of the nuisance upon the premises of the plaintiffs, which the papers disclose, is both a private and a public grievance which should not be continued. The order will be settled on notice and is granted, with ten dollars costs to the plaintiffs if they succeed in the action.

SUPREME COURT.

ALFRED S. ROSENBAUM, respondent, agt. THE UNION PACIFIC RAILWAY COMPANY, impleaded, appellant.

HENRY C. ROSENBAUM, respondent, agt. THE UNION PACIFIC RAILWAY COMPANY, impleaded, appellant.

Corporations — their liability — Code of Civil Procedure, section 3343, subdivision 18 — Domicile of federal corporation — by what determined.

Under section 3343, subdivision 18 of the Code of Civil Procedure, the location of a federal corporation is determined by the place of its principal office. Its domicile is where its principal office is.

Where an act provides that corporations consolidated under it shall assume as a condition of the right the payment of the liabilities of the several corporations which are absorbed in the new corporation, each holder of coupons in either of the corporations so absorbed is at liberty to maintain an action directly upon contract against the new corporation, by reason of its having absorbed the one which issued the bonds.

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First Department, General Term, May, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEALS from orders denying motions to vacate attachments.

George H. Adams, for appellants.

E. L. Andrews, for respondent.

BY THE COURT (orally). — We think these motions were properly disposed of by the court below on the question of residence. The appellant is unquestionably a foreign corporation, because created by the laws of the United States. It is not a foreign corporation which has its location and carries on its business in the city of New York. Within the meaning of the law its domicile is where its principal office is located. That does not appear, even by the original affidavits, to be in the city of New York. It is, in point of fact, as shown by the papers, in the city of Boston. And if the corporation has a location there it certainly has none here.

And as to the main questions, the act of the state of Kansas in respect to the consolidation of corporations very clearly provides that the corporations consolidated under it shall assume, as a condition of the right, the payment of the liabilities of the several corporations which are absorbed in the new corporation. The effect of that is, as a matter of course, to impose the liability, not as a statutory one, but as a contractual one. The corporation that absorbs the consolidated corporation, thereby, under those statutes (which, of course, make the contract lawful and not subject to any provision of any statute of frauds), undertakes and promises to pay to every holder of a debt of a corporation that is absorbed the obligation existing in his favor against the corporation that ceases to exist, or the several corporations which cease to exist.

Each one, therefore, of the holders of these coupons is at liberty, in our judgment, to maintain an action directly upon

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contract against this corporation by reason of its having absorbed the one which issued the bonds, because the statute has so provided. Whether it be an express or implied contract makes no difference in the eye of the law. It is still a contract enforceable at law and recognized by the statute of Kansas, and therefore to be recognized by our courts.

These orders are affirmed, with costs.

CITY COURT OF NEW YORK.

• ALEXANDER FRAZER agt. CHARLES E. WARD.

Security for costs — Money deposited in lieu of an undertaking, as security for costs — Not liable to seizure on other judgments.

A deposit as security for costs must be regarded, for all the purposes of the action, as the property of the person making the deposit. But where the action results favorably to the plaintiff, and the litigation is terminated, the deposit is not liable to seizure on other judgments if the money, in fact, belongs to other persons who made the deposit, subject only to the contingency stated.

Special Term, May, 1885.

THE plaintiff brought an action in this court against the defendant herein to recover \$800. The trial eventuated in a verdict for the defendant, on which judgment was entered against the plaintiff for \$270.64 costs. This judgment proceeded upon the sole ground that the action had been prematurely brought. After the claim became due, according to this determination, the plaintiff brought the present action for the same cause, and on the 8th of May, 1885, succeeded in recovering a judgment against the defendant for the entire amount of his demand and interest, viz., \$896. In the present action the plaintiff, who had become a non-resident, deposited, under an order of the court and in lieu of an

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undertaking, \$250 as security for costs. On the 10th of April, 1885, an order founded on the first judgment was granted by judge HAWES, requiring John Reid, the clerk of the city court, to appear and be examined in regard to property said to be in his hands belonging to the judgment debtor; the object of the proceeding, as subsequently developed, being to reach and apply on the first judgment in favor of the defendant the money deposited by the plaintiff as security for costs in the present action. Upon the examination of Mr. Reid, he testified that he held \$250 under the aforesaid circumstances. An order was thereupon made on the 13th of April, 1885, requiring Mr. Reid to pay over the deposit to the defendant's attorney, and it was paid over accordingly. The proceedings to obtain this application of the deposit were *ex parte*, but are not on that account irregular. The plaintiff now moves to set aside the order directing the payment over of the money, and for a direction that the defendant's attorney restore the deposit. The application is founded on an affidavit made by Ezra A. Tuttle, one of the plaintiff's attorneys, in which he swears that, pursuant to the order requiring security for costs, or a deposit in lieu thereof, and not otherwise, "and for the purpose expressed in said order, deponent deposited on the 8th day of April, 1885, the sum of \$250 with the clerk of this court; that said money was deposited in the name of 'Tuttle & Goodell, attorneys for the plaintiff,' and a receipt therefore was taken by deponent; that said money was not the property of the plaintiff, nor was it deposited to the credit of the plaintiff, nor in any manner subject to his control, but was the property of said Tuttle & Goodell, and was deposited and placed in the custody of the court for the purpose specified in said order, and for no other purpose." The question presented is whether the money deposited under these circumstances became the property of the defendant only for the limited purposes specified in the order, or generally for all purposes.

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Flanders & Tuttle, for motion.

E. P. Wilder, opposed.

McADAM, C. J. — Except in the instance provided in section 586 of the Code, a deposit in lieu of bail must be regarded for all the purposes of the action as the property of the party on whose behalf the deposit is made (8 *Abb. [N. S.]*, 155; 45 *N. Y.*, 393). Such money, although in *custodia legis*, may be attached subject to the contingency on which the deposit was made (74 *N. Y.*, 145; 83 *N. Y.*, at p. 237). If the deposit is to be regarded for all purposes as the money of the plaintiff, it follows that the order to pay over was legally made; for, assuming the money belonged to the plaintiff herein, the only persons who could object to the application made of it were the plaintiff and the defendant. The order to pay over having been made on the application of the defendant, concluded him as to its distribution, and it likewise concluded the plaintiff, because it was founded on a legal proceeding against him. It would not ordinarily prejudice the plaintiff's attorneys on the question of liability for costs, because the order requiring security was made and complied with. So that, but for the question of title in the attorneys, which will next be considered, there can be no doubt of the right of the defendant to do what he did. The contingency on which the deposit was made has happened. The plaintiff recovered a judgment, and by force of it the plaintiff became entitled to the return of his deposit. The deposit has answered all the purposes for which it was made, and the requirements of the law have been fully satisfied. But the difficulty which arises is that the money deposited up till the time of the deposit belonged to the plaintiff's attorneys. For the purpose of securing the defendant against the costs of the present action, the money deposited was to be deemed the property of the plaintiff. But when it was demonstrated by the result of the action that the defendant was not entitled to costs, and no longer needed the required indemnity, the deposit ceased to be security, and the plaintiff's attorneys, as the true owners

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of the fund, became entitled to a return of their money. In other words, it seems to me that an attorney for a plaintiff may consent to deposit his own money as security for costs to which his client may become liable in a particular action, with the risk that if the plaintiff therein is defeated the money for the purpose of satisfying the costs recovered by the defendant is to be regarded as the property of the plaintiff. I think he risks no more. The law is satisfied with this construction of the liability assumed, and the defendant proceeded against by the non-resident plaintiff is fully protected by it. If this be so, the result would seem to follow, that after it has been judicially determined that the defendant cannot by any possibility recover costs in the action, that the money should go back to the source from which it emanated, and to the parties to whom it equitably belongs. The identity of the money was not destroyed, but preserved. The identical money which the plaintiff's attorneys deposited remained in the hands of the clerk until he was ordered to pay it over. There is no proof that it was loaned to the plaintiff, or was ever in his possession. It was deposited by the plaintiff's attorneys for a special purpose and at a specified risk, and when the object of the deposit was satisfied, and the risk ceased, their right to its return became complete. The plaintiff does not question their right to it. The deposit was made in lieu of an undertaking, and subject only to the risk which sureties upon an undertaking would have assumed if an undertaking had been given. Because money was deposited in lieu of an undertaking there is no reason why friendly depositors, who furnished the money instead of writings, should be subjected to greater risk, or liability to loss, than if they had subscribed the usual undertaking with which the law is satisfied. Under the circumstances the conclusion seems inevitable that the deposit must be restored to the clerk of the court, there to remain subject to such application as may be made in respect thereto, as the parties interested therein may be advised.

No costs.

Jacquin agt. Jacquin.

N. Y. COMMON PLEAS.

CHARLES JAOQUIN agt. SOPHIA JAOQUIN.

Husband and wife — Business partnerships between them not authorized.

Business partnerships between husband and wife are not authorized. Therefore a husband cannot claim under a business copartnership with his wife, the right to a dissolution of the same and the appointment of a receiver.

This is adverse to *Zimmerman agt. Erhard and Dodge* (59 How., 11); and *Graff et al. agt. Kinney* (1 How. [N. S.], 59); see, also, *Fairlee agt. Bloomington* (67 How., 292).

Equity Term, April, 1885.

THIS action is brought by a husband claiming under a business copartnership with his wife the right to a dissolution of the same and the appointment of a receiver.

LARREMORE, J. — The enabling statutes in relation to the authority of a married woman to hold property or transact business have not expressly authorized a married woman to enter into partnership with her husband, and, as I read the decision, no such authority or right is conferred. In this case it appears that the marital relation existed between the plaintiff and defendant, and I find no authority that authorizes the husband to claim under a business copartnership with his wife, the right to a dissolution of the same and the appointment of a receiver. In the absence of any statutory enactment, the rule of the common law in relation to husband and wife remains unchanged, and as no express provision is made by statute for a business copartnership between husband and wife, the old rule must prevail. The complaint, therefore, must be dismissed. but without costs.

Doctor agt. Schnepf.

CITY COURT OF NEW YORK.

MAX DOCTOR and SIMON HATCH, plaintiffs and respondents,
agt. JOHANN N. SCHNEPP, defendant and appellant.

*Attachment—Sufficiency of affidavit—Code of Civil Procedure,
sections 636, 8169.*

An affidavit for an attachment made by H. states as follows: "I am a member of the firm of D. & Co., and one of the plaintiffs above-named, the only plaintiffs so above-named being D. and himself, it is a fair presumption that they constitute the firm."

It is to be presumed that if counter-claims existed in favor of the defendant, that some knowledge of that fact would have been possessed by the plaintiff H. making the affidavit. For the purposes of the statute his knowledge constituted that which was known to the plaintiffs, and his allegation is a substantial compliance therewith.

An affidavit by B. which states that he was the bookkeeper of the plaintiffs and personally acquainted with the defendant; that the defendant had in his possession several statements showing a balance due to the plaintiffs for the goods sold and delivered to him, and that he had frequently acknowledged to the affiant his indebtedness to the plaintiffs for the amount claimed, is sufficient to show the existence of a cause of action in favor of the plaintiffs against the defendant.

An affidavit by B., which states that "a short time ago he (defendant) represented himself to be a man of means," clearly indicates that he had arrived at mature years and that he was an adult, and is a sufficient compliance with subdivision 5 of section 8169 of the Code of Civil Procedure.

General Term, May, 1885.

Before HYATT and HALL, JJ.

APPEAL from an order denying a motion to vacate an attachment.

The motion was made on the papers on which the attachment was granted.

Ira Leo Bamberger, for appellant.

Charles A. Hess, for respondents.

Doctor agt. Schnepf.

HYATT, J. — The appellant contends, first, that the affidavit of Simon Hatch does not state that the plaintiffs constitute the firm of Doctor & Co., but merely that Hatch is a member of the firm and one of the plaintiffs; that this is not sufficient to enable him to swear that the sum is due over all counter-claims known to the plaintiffs, and further, that Hatch merely swears that the sum is due over all counter claims known to deponent, which is also insufficient.

Hatch swears that he is one of several plaintiffs. His distinct statement is: "I am a member of the firm of Doctor & Co., and one of the plaintiffs above named." The only plaintiffs so above named being Doctor and himself, it is a fair presumption that they constitute the firm.

From the relation of the affiant to the parties and the subject matter in issue, it is apparent that he has knowledge of the alleged transaction. The law will not infer that matters positively sworn to were not within the personal knowledge of the affiant, unless it is apparent that such knowledge is a matter of impossibility. It is to be presumed that if counter-claims existed in favor of the defendant, that some knowledge of that fact would have been possessed by the plaintiff Hatch making the affidavit. For the purposes of the statute, his knowledge constituted that which was known to the plaintiffs, and his allegation is a substantial compliance therewith (*Stevens agt. Middleton*, 26 Hun, 470).

The cases of *Murray agt. Hanken* (30 Hun, 37, *Gen. Term*, 1st Dept.), and *Cribbins agt. Schillinger* (*Id.*, 284), cited by the defendant in support of his position, do not avail him. In the first the affidavit was made by the agent of the plaintiff, who swore that the sum was due over all counter-claims existing in favor of the defendant to the knowledge of deponent. The learned judge, writing the opinion of the court, admitted that had this allegation been "to the knowledge of the plaintiff," the affidavit would have been sufficient. The learned chief justice, dissenting from the decision of the court, suggested that the agent evidently had

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better, or at least as good, knowledge of the condition of things between the plaintiff and defendant as the plaintiff himself, and that the affidavit was therefore sufficient.

In the second case the affidavit was made by the plaintiff's attorney, alleging a sum due over claims, "known to the plaintiffs or the deponent." The general term, fourth department, there held that "the affidavit of the attorney might have sufficed if it had appeared that he had knowledge as to the existence of counter-claims, and perhaps would have been enough (though as to that we express no opinion) if he had stated that he was informed by his clients that none existed." It is thus obvious that the above cases are inapplicable to the case at bar.

However, irrespective of the strength of this affiant's position, arising out of the fact that he was one of the only two plaintiffs in the case, it would seem that his affidavit would have been sufficient if it had not contained the precise words used in the Code of Civil Procedure (*sec. 636*). If equivalent words were used, and it furnished evidence from which the judge might lawfully satisfy himself of the truth of the matters required to be shown, and even if the words "known to him" after the word "discounts," had been omitted, it would not have affected its sufficiency (*Lamkin agt. Douglass, 27 Hun, 517, Gen. Term, 3d Dept.*).

The affidavit on which the attachment was granted, states a sufficient cause of action against the defendant (*Kiefer agt. Webster, 6 Hun, 526.*)

It is true that the affidavit of Brown states the action to be, for goods sold and delivered to the defendant, but whether by the plaintiffs or some one else does not appear. It states more, however, and precisely the facts necessary to show the existence of a cause of action in favor of the plaintiffs against the defendant, to wit, that the affiant was the bookkeeper of the plaintiffs and personally acquainted with the defendant. That the defendant had in his possession several statements showing a balance due to the plaintiffs, for goods sold and

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delivered to him; that he had frequently acknowledged to the affiant his indebtedness to the plaintiffs for the amount claimed in the suit now pending.

The case at bar in this respect differs widely from that of *Pomeroy agt. Ricketts* (27 Hun, 242), relied upon by the defendant. In that case the allegations of the affiant simply were that "the defendants owed my firm \$1,808, over and above all counter-claims known to the plaintiffs and to me for goods sold and delivered by my firm to the defendants" (*Pomeroy agt. Ricketts, supra*). This was held to be simply a recital from which the plaintiff, making the affidavit, concluded that such a right of action did exist.

In the case at bar, if the affiant Brown has sworn truthfully concerning facts peculiarly within his personal knowledge, the defendant has conceded the existence of a course of action as alleged in favor of the plaintiffs against him.

A further objection is advanced, that the affidavit does not state that the defendant is an adult (*sub. 5, sec. 3169, Code of Civ. Pro.*), and that this omission is a jurisdictional defect. This court at special term has held that failure to so allege is immaterial (*Wentzlar agt. Ross, 50 How. Pr., 397*); subsequently a different view was entertained and this point sustained at such a term of this court (*American Mills Co. agt. Schnitzer, 1 Daily Reg., June 16, 1884*).

In the latter case I apprehend that there was an entire absence of proof upon which to found a legal presumption that the defendant was an adult. In this case the affidavit of Brown says, "a short time ago he (defendant) represented himself to deponent to be a man of means." This would clearly indicate that he had arrived at mature years, and that he was an adult.

The order denying the motion to vacate the attachment, must be affirmed, with costs.

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SUPREME COURT.

CORNELIUS B. SUTTON agt. RACHEL A. NEWTON, as administratrix of, etc., of HIRAM DU BOIS, deceased.

Costs — executors and administrators — when prevailing party entitled to costs and disbursements — Code of Procedure, section 817 — Code of Civil Procedure, sections 1835, 1836, 3246.

The repealing act of 1877 leaves section 817 of the Code of Procedure still in force, and consequently, as provided thereby in a reference under the Revised Statutes of a claim against a dead person's estate, the prevailing party is entitled to recover the disbursements provided for by that section.

Where, by agreement of the parties, an action is brought "in lieu of a reference," that is to say, is substituted therefor, and the plaintiff is the prevailing party, he is entitled to recover the fees of the referee and witnesses and other necessary disbursements to be taxed according to law.

Where the claim, as presented, was for \$4,728.78, and the defendant not only rejected the entire claim of the plaintiff, but set up a counter-claim against him for the sum of \$2,624.55, for which sum she asked an affirmative judgment against the plaintiff, with interest, besides costs of the action and the referee appointed to hear and decide the issues, rejected the counter claim entirely and found \$621.55 due to the plaintiff from the estate :

Held, that the attempt made by the defendant to recover judgment for a large and independent claim against the plaintiff, in which she entirely failed, constituted an unreasonable resistance to the demand of plaintiff and entitled him to the costs of the action.

Held, further, that the attempt by the defendant to recover through the suit brought against her a large counter-claim against the plaintiff, brings her within the cases provided for by section 1835 of the Code of Civil Procedure, in which costs may be awarded to the plaintiff.

Ulster Special Term, April, 1885.

MOTION for costs against the defendant.

Charles A. Fowler, for plaintiff.

A. Schoonmaker, for defendant.

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WESTBROOK, J. — After the presentation of the claim, to recover which this suit was instituted by the plaintiff, to the defendant it was agreed "that an action should be brought instead of a reference with the view to a speedier trial, which was desirable for all parties, and the action was brought upon that understanding *in lieu of a reference*, and not because the administratrix did not offer or was not willing to refer."

The extract just quoted from the affidavit of the counsel for the defendant contains the agreement under which this action was brought, and must be considered in disposing of the motion which the plaintiff has made for costs.

Section 3246 of the Code of Civil Procedure, in connection with sections 1835 and 1836, prescribes the rule for the recovery of costs, "*in an action* brought by or against an executor or administrator, in his representative capacity;" but does not affect the allowance of costs and disbursements in a reference under the Revised Statutes. The contrary of this was affirmed in *Miller agt. Miller* (32 Hun, 481), but certain provisions of the law were, as it seems to me, so clearly overlooked that the decision cannot be followed without the reassertion by the general term of the conclusion therein stated, after its attention has been again called to the subject.

By section 317 of the Code of Procedure it was declared that in a reference under the Revised Statutes "the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements to be taxed according to law."

Chapter 417 of the Laws of 1877 repeals (*sec. 1, sub. 4*) "all of the Code of Procedure, except the following sections and parts of sections thereof, to wit: " * * * Sections three hundred to three hundred and twenty-two, both inclusive." This makes it clear that the repealing act of 1877 left section 317 of the Code of Procedure intact, and consequently, as provided thereby in a reference under the Revised Statutes of a claim against a dead person's estate, the

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prevailing party recovered the disbursements provided for by that section. Chapter 245 of the Laws of 1880, which, by subdivision 4 of section 1, also repealed the act "called the Code of Procedure" (*page* 369), further expressly declared by subdivision 8 of section 3 (*page* 375) that such repeal did "not affect the right of a prevailing party to recover the fees of referees and witnesses, and his other necessary disbursements upon the reference of a claim against a decedent, as provided in those portions of the Revised Statutes left unrepealed after this act takes effect."

In construing the act of 1880 it should be borne in mind, as has been shown, that when that act took effect, though the Code of Procedure had been in part repealed by the act of 1877, yet section 317, which gave the disbursements in the cases excepted out of the repealing act of 1880, was left unrepealed and in full force. When, therefore, such act (that of 1880) further repealed the same Code, but declared such repeal should "not affect the right of a prevailing party to recover the fees of referees and witnesses, and his other necessary disbursements" in a reference of a claim against a deceased person's estate under the Revised Statutes, such declaration was only another mode of providing that the part of section 317 of the Code which gave such disbursements was unaffected by the repealing act of 1880, as it was by that of 1877. Very clearly, then, so much of section 317 of the Code of Procedure as gives disbursements in a recovery against the estate of a deceased person upon a reference under the Revised Statutes is not repealed, but is in full force and effect (*See Hall agt. Edmonds*, 67 *How.*, 202).

As, by agreement of the parties, the present action was "in lieu of a reference," that is to say, its *substitute*, it follows that the plaintiff, who was "the prevailing party," is, by the unrepealed part of section 317 of the Code of Procedure, "entitled to recover the fees of the referee and witnesses, and other necessary disbursements to be taxed according to law."

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The remaining question which the motion presents, to wit: Is the plaintiff entitled to costs other than the disbursements? will now be considered. The referee, who was appointed to hear and decide the issues in the action, has, by his report dated January 8, 1885, found \$621.55 due to the plaintiff from the estate which the defendant, as the administratrix thereof, represents. The claim presented was for \$4,728.78, and the large reduction of the demand of the plaintiff would ordinarily, in an action brought against an executor or administrator to charge the estate he represents, prevent the recovery of costs" (*See many cases cited, 2 Abbott's Digest, 357, paragraphs 180, 181, 182*). In a reference under the Revised Statutes for which this action is a substitute, the rule, except as to disbursements, is the same (*Robert agt. Ditmas, 7 Wend., 522; Carhart agt. Blaisdell, 18 Wend., 531; Pursell agt. Fry, 19 Hun, 595*). Indeed, the Revised Statutes, in providing for the reference (*3 R. S. [7th ed.], 2300, sec. 37*), declare "the court may * * * adjudge costs as in actions against executors." The fact that the defendant did not, upon the presentation of the claim, offer to pay anything, gives no right to costs. This point was expressly decided in *Carhart agt. Blaisdell* (18 *Wend.*, 531), just referred to.

The defendants, however, not only rejected the entire claim of the plaintiff, but set up a counter-claim against him for the sum of \$2,624.55, for which sum she asked an affirmative judgment against the plaintiff, "with interest thereon from March 3, 1877, besides costs of this action." The defense then, which the defendant made to the action, was not only a resistance to the claim of the plaintiff, but also the prosecution of an independent and distinct demand against him for a large amount. If the defendant had sought to recover that sum by an action against the plaintiff and had failed, she would have been compelled to pay costs. The counter-claim set up in the answer was really an independent action against the plaintiff, and its resistance was the trial of another issue than that presented by his demand against the defendant.

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As the costs incurred in the successful defense of the claim of the defendant form a very considerable part of the expenditure against which the plaintiff seeks indemnity, no good reason is seen to refuse it. It is, therefore, held that the attempt made by the defendant to recover judgment for a large and independent claim against the plaintiff, in which she entirely failed, constituted an unreasonable resistance to the demand of the plaintiff. It was a resistance of the plaintiff's claim, because, before he could obtain a report in his favor for that which was his due, the independent demand or counter-claim of the defendant had to be defeated. If the claim of the plaintiff had been reduced by allowing that of the defendant, then it could not be said that the interposition of the counter-claim was an unreasonable resistance to the demand of the plaintiff, unless the latter had, in the presentation of his claim, credited that of the estate against him. When, however, as in this case, the claim which the defendant seeks to enforce is without merit, and the plaintiff is compelled to overcome and resist it before he can obtain payment of that which is his due, then the interposition of such a claim makes an unreasonable resistance by the defendant to that of the plaintiff, and entitles the latter, when successful, to the costs of the action.

The result of my examination is, that the motion for costs to the plaintiff must be granted. Apart from the reason hereinbefore presented for allowing disbursements, if the action in which the motion is made is not to be deemed a substitute for a statute reference, but as an action in which the rule prescribed by section 3246 of the Code of Civil Procedure applies, the motion should still prevail. The attempt by the defendant to recover through the suit brought against her a large counter-claim against the plaintiff, and its failure brings her within the cases provided for by section 1835, in which costs may be awarded to the plaintiff.

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SUPREME COURT.

THE PEOPLE *ex rel.* ALFRED P. WRIGHT agt. THE COMMON COUNCIL OF THE CITY OF BUFFALO.

Mandamus—Civil service—Municipal corporation—When citizen and taxpayer may apply for a writ of mandamus.

By section 2 of chapter 410 of the Laws of 1884, it is the duty of the mayor of each city to prescribe such regulations for the admission of persons into the civil service of such city; and to carry out the design and intention of the law it was provided that the mayor *shall*, from time to time, employ suitable persons to conduct such inquiries and make examinations; and the power to employ includes the obligation to provide for their compensation.

Where, under the charter of the city of Buffalo, the mayor made the estimate for what he considered would be the necessary expenses of carrying these provisions of the laws of the state into execution, and communicated and presented such estimate to the common council:

Held, that the common council had no power to wholly reject such estimate. Although it may alter or amend the estimate, it has no authority to arbitrarily reject it. Its duty is to consider it in good faith, with sound judgment and discretion; and if any misapprehension has intervened in its amount, to correct it and apportion it to the probable necessities of the service.

A writ of *mandamus* is the appropriate remedy by which the common council may be required to consider the estimate and vote the amount thought necessary to carry out the law.

A citizen and a taxpayer has the power and right to apply for the writ.

It is only when the application for the writ is made to secure some personal or private redress that the applicant must be shown to be interested in obtaining it before the writ can be directed to issue. Where the act omitted to be performed affects the public interests generally, and all citizens are equally concerned in securing its performance, and that has been enjoined by a law of the state, it is sufficient, to support the application, that the applicant is a citizen and entitled to insist upon the execution of the laws of the state.

Erie Special Term, April, 1885.

MOTION for a peremptory writ of *mandamus* to be directed to the common council of the city of Buffalo, commanding that body to consider and pass upon the estimate made by the

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mayor for salaries and expenses of executing the civil service law, so far as it has been made applicable to the city of Buffalo.

Ansley Wilcox, E. C. Sprague and Sherman S. Rogers, for applicant.

Herman Hennig, city attorney, for common council.

DANIELS, J. — The mayor of the city, in submitting to the common council the estimates for his department, included the sum of \$1,250 for salaries and expenses of executing the civil service law. This item was considered by the common council at its regular meeting held on the 6th day of April, 1885, when, by its action as a committee of the whole, it was stricken out of the estimate; and it has been stated in one of the affidavits on which the application has been made, that the common council in its action was controlled by the determination to make no provision for salaries and expenses of executing the civil service laws, and designed thereby to nullify and prevent their execution. This has not been denied, and the action taken by that body, or its members tends to either sustain this conclusion, or that the common council are acting under a misapprehension concerning their duties and obligations under the law. And it is to correct their action in this respect that the writ of *mandamus* has been applied for, directing the common council to consider and sustain the estimate so far as it was made by the mayor or may be required for the execution of the provisions of the law relating to the city of Buffalo.

The application has been resisted on the ground that the action which was taken was not that of the common council, but of its committee; but an answer to the objection is presented by the circumstance that the committee of the whole, by which the action was taken, was made up of the members of the common council, and in their action they officiated as the common council of the city. Their powers and duties in

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this respect have been prescribed by section 6, title 5 of the charter of the city of Buffalo, and that requires, when the estimates shall be made and submitted, that the common council shall proceed to consider the same, and whether it does so nominally as a committee, or as the common council itself, the exercise of the authority will be precisely the same. The power has been conferred alone upon the common council, and whether its members act under that name, or under the name of a committee of the whole, can make no substantial difference in the exercise of this authority; it will still be, under this section, the action of the common council, although it may not be so final in its character as to render further consideration needless. That further consideration by the members of the common council as such, or acting as a committee of the whole, would change the result is extremely improbable, inasmuch as the estimate was stricken out by the decisive vote of thirteen to one. The probabilities, on the contrary, are so decided, arising out of the action which has been taken, as to support the conclusion asserted in the affidavit, that it is the design of the common council to reject the estimated item, and in that manner prevent the law from being carried into effect. And these facts are sufficient to entitle the application to be sustained if a legal right to the writ has been made out and the applicant is authorized by law to maintain the proceeding.

It is true, as has been urged on behalf of the common council, that the writ is not to be issued in a doubtful case, or where any other remedy for adequate redress shall be found to exist. But no other remedy has been prescribed or provided by law for the redress of the wrong complained of as the foundation of this action. And if the right is to be clearly derived from the law, then neither of these objections stand upon any legal foundation.

The right to the allowance of the estimate, or of some other proper and adequate amount, depends upon the construction which shall be given to chapter 354 of the Laws of 1883 as it

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has been amended by chapter 410 of the Laws of 1884. By these acts very definite and broad provisions were first made to regulate the civil service of the state, and to provide for promotions and appointments to certain public offices of the state. This, so far as the laws were rendered applicable to the city, was to be done by open and competitive examinations, testing the fitness of the applicants for appointment in the public service. It was not, in the first instance, rendered obligatory upon the city, but the mayor was vested with the authority to provide rules and regulations for carrying its provisions into effect in the official civil service of the city so far as the offices designated and mentioned in it were referred to. The mayor of the city, it has been made to appear, did provide such rules and regulations, and persons were employed and selected to make investigations and examinations authorized by the law, and they have to the present time been conducted without subjecting the city to expense. But by section 2 of chapter 410 of the Laws of 1884, the mayor of the city was no longer left at liberty to exercise his volition upon the subject. But the duty was made mandatory, and he was not only authorized but thereby directed to prescribe such regulations as had previously been indicated in the law of 1883, or to continue and carry those into effect which had been previously adopted. And to carry out the design and intention of the law it was provided that the mayor "shall from time to time employ suitable persons to conduct such inquiries and make examinations, and shall prescribe their duties and establish regulations for the conduct of persons who may receive appointments in the said service" (*Laws* 1884, 488, *sec.* 2). And to render the observance of this duty still more imperative, if that could be done after the employment of this positively mandatory language, it was further declared in the same section that "after the termination of three months from the passage of this act (which took effect on the 29th day of May, 1884) no officer or clerk shall be appointed, and no person shall be admitted to or be promoted

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in either of the said classes now existing or that be arranged hereunder pursuant to said rules until he has passed an examination or is shown to be exempted from such examination in conformity with such regulations." These directions are so clear and positive as to leave the mayor no discretion upon the subject, but he must from time to time employ suitable persons to conduct the examinations and make the inquiries required. But neither this act nor the one preceding it contains any express provision for compensating the persons to be so employed by the mayor, and for that reason it has been urged that their services were intended to be obtained gratuitously. But the act has not so declared or provided; and by requiring the mayor to employ suitable persons to perform these services, it is to be implied from that language that it was intended that they should be reasonably remunerated for such services. For in no other manner can persons be ordinarily induced to render services of the description of those prescribed by the law. What the mayor has been required to do is to employ suitable persons, and the power to employ others to render services on behalf of the municipality, includes the obligation to provide for their compensation. The employment can usually be expected to be secured in no other way; and when a person or persons are employed it is a reasonable, as well as a natural implication, that the services rendered in the course of the employment shall be reasonably or correspondingly rewarded. This is the effect of employing others to render services in the ordinary relations of business, and as the city has not been exonerated from that effect it may be assumed that it was designed that it should observe and fulfill the ordinary obligation arising out of the act of employment. In no other way can the services of others be ordinarily secured. It is true that they have been otherwise secured up to the present time under the authority contained in the preceding law. But there is no expectation that gratuitous services will be further rendered for the city under this statute by persons whom the

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mayor shall consider it his duty to employ. It has been intimated that persons may be found who would be willing to render the same service without compensation, but they may not be persons whom the mayor, in the exercise of this authority, would be willing to select or appoint. That certainly is his judgment, for he made this estimated amount upon the apparent understanding that it would become necessary to enable him to carry into effect these provisions of the statute. And where an appropriation of money is essential for that purpose, although not so declared in the law itself, the obligation to make it is to be derived by implication from it. The rule upon this subject is, that "whenever a power is given by statute everything necessary to make it effectual or requisite to attain the end is implied;" and "where the law requires a thing to be done it authorizes the performance of whatever may be necessary for executing its commands" (*Sedg. on Statutory, &c., Law*, 92; 1 *Kent* [7th ed.], 513, *marg. p.* 464). *Steif agt. Hart* (1 *Comst.*, 20, 30); *Chipman agt. Montgomery* (63 *N. Y.*, 221), and the case of *Baker agt. City of Utica* (19 *N. Y.*, 326), requires no different construction to be placed upon the statute. It is, on the contrary, an authority in favor of the right of persons rendering services to a municipal corporation to be compensated for the value of such services where no specific provision of law has been made declaratory of the right or extent of compensation. In that class of cases the compensation is to be a reasonable remuneration for the services rendered; and it would be the duty of the mayor, within these statutes, to confine the compensation to such limits. What the law intended was that the mayor should be obliged to employ the persons whose services should be requisite to carry out its provisions, and to exercise all the authority which should become necessary to attain that end. And as the persons employed would be entitled to be reasonably compensated for the services rendered by them the obligation to provide for the payment of that compensation has been included in the law. By omitting

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to provide the manner in which the money should be obtained to make this compensation the end and purpose of the law are not to be defeated ; for, as the services are on the employment of the mayor and on behalf of the city, the funds required to remunerate the employment are necessarily a charge upon the city, as all other expenses of the municipal government have been made by the charter. Whatever may be required to meet these obligations has been directed, by title 2 of the charter, to be estimated by the heads of the departments. This includes all expenditures considered to be necessary for the ensuing fiscal year in the administration of the affairs of the city government. This is such an expenditure, and under this portion of the charter it was a proper subject to be estimated, and estimated by the mayor, inasmuch as he is the person who was to exercise this authority and employ the persons required to render these services. Pursuant to this obligation the mayor made the estimate for what he considered would be the necessary expenses of carrying these provisions of the laws of the state into execution, and communicated and presented the estimate to the common council. This body has been authorized by section 6 of title 5 of the charter by a vote of two-thirds of all the members elected to alter or amend the estimate. But where it has been made pursuant to the direction of a positive statute, as it has been in this instance, the common council has not been invested with the power of wholly rejecting the estimate. It may under the authority to alter or amend the estimate, extend, modify or limit it, as that may appear to be justified by the facts, but the common council has no authority arbitrarily to reject the estimate. Its legal, as well as its absolute duty is, on the contrary, to consider it in good faith, with sound judgment and discretion, and if any misapprehension has intervened in its amount, to correct it and apportion it to the probable necessities of the service for which it may be designed. This, according to the papers which have been produced upon the application, has not been done. The esti-

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mate was not considered, but it was arbitrarily rejected, for the purpose, as it has been stated, of defeating the execution of the law. That neither the members of the common council nor any other official of the state or city has the right or power to do. The government, whether general or local, is one of laws, and when a law has been constitutionally enacted it is the imperative duty of all public officers, and this was expressly made so by the act itself, to carry its provisions into effect. Every public officer is required, before he can enter upon the discharge of his duties to take his official oath that he will discharge the duties of his office according to the best of his ability, and no official duty is more imperative or important than those which the positive laws of the state have declared shall be observed and performed. Beyond this the law has further re-enforced this obligation by a very general provision declaring that "a public officer or person holding a public trust or employment, upon whom any duty is enjoined by law, who willfully neglects to perform the duty, is guilty of a misdemeanor" (*Penal Code, sec. 1175*). No public officer has been invested with the discretion to omit to carry into effect a law of the state for the reason that he may not approve of its object or policy, or for any other reason. He is allowed to exercise no such choice or authority, but the obligation is general and imperative to carry the laws of the state into execution according to their fair import, to be derived from the language employed in their enactment.

By rejecting the estimate communicated in this manner to the common council, the authority of the mayor to execute this mandatory provision of the act of 1884 may be practically nullified. For no balance, it has been shown, will remain of the estimate submitted for the expenditure of his own department in other respects, which could be appropriated to the payment of persons employed by the mayor under the authority of the law of 1884. And where that is the fact, and no appropriation exists out of which payment can be

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made, by section 9 of title 5 of the charter contracts have been prohibited from being made, and no liability for payment can be created when they may be made. And no warrant for the expenditure to be incurred in the performance of any such contract, if it should be made, is allowed to be paid by the treasurer of the city. By striking out this item from the estimate of the mayor therefor, he will be deprived of the ability to perform the duty which the act has declared shall be performed by him, and in that manner this provision of the law will be wholly defeated and rendered nugatory. And that the members of the common council of the city cannot, in the exercise of any legal authority with which they have been invested, accomplish. The authority which has been given them has been designed to promote and secure the execution of the laws, and not their nullification by their failure or refusal to act.

The case is not within section 4 of title 3 of the charter of the city, for the reason that the persons to be selected and employed by the mayor will not be persons elected or appointed under the charter of the city, but the power to appoint them is wholly derived from the acts of 1883 and 1884, which have already been mentioned.

That the writ of *mandamus* is the appropriate remedy by which the common council may be required to exercise the authority conferred upon it by law for the benefit of the public, cannot admit of any serious question. It was employed to secure the observance of a duty enjoined by the common council of the city of New York, in *People agt. Common Council, etc.* (45 Barb., 473), which was afterwards affirmed by the court of appeals (3 Keyes, 81). And as the case presented by the facts supported by the affidavits has been made out, the right disclosed by it may be enforced and maintained through the instrumentality of this writ, under this authority.

The remaining objection to be considered is that involving the power or right of the present applicant to apply for the issuing of the writ. He is shown to be a citizen and taxpayer of the

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city, interested, therefore, in the orderly maintenance of its government. That result can only be secured, so far as these legislative acts extend, by observing and conforming to their provisions. If they are not complied with, then, so far as public offices are to be filled to which they relate, they cannot be supplied, and the government of the city to that extent will be subverted. And every citizen has such an interest in its affairs as to be entitled, by a proper application to the court, to avert the occurrence of these consequences. It is only when the application for the writ is made to secure some personal or private redress that the applicant must be shown to be interested in obtaining it before the writ can be directed to issue. Where the act omitted to be performed affects the public interests generally, and all citizens are equally concerned in securing its performance, and that has been enjoined by a law of the state, a different rule prevails. There it is sufficient to support the application that the applicant is a citizen and entitled to insist upon the execution of the laws of the state. These laws are made for the promotion of public order and individual security, and accordingly every citizen has a sufficient interest in their execution to entitle him to prosecute an application of the description. Laws are enacted for the well being, good order and security of the community, and of its constituent members. Public officers are provided for, elected and appointed to execute their provisions, and where they designedly fail or intentionally omit to do that, every citizen has the inherent right to apply to this court and insist upon it that the writ of *mandamus* shall issue in such a form as to secure the observance of that duty. The authorities in this and several other states, and those also of the court of kings bench in England, have gone very far in supporting this proposition. In fact, the utmost limit of judicial interference has been reached for the purpose of sustaining the right of private persons to insist upon the performance of public duties by public officers. An extreme case was that of the *King agt. Brown*, note of which will be

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found in 3 *Term*, 574, under the title of *Rev agt. Smith*, where an application of this nature was sustained against the common councilmen of York, because they had failed to observe the requirement of an act of parliament declaring that corporate officers generally, as a qualification for holding their offices, should receive the sacrament within six months. The interest of the applicant in the observance of this duty was extremely insignificant, and yet the application was sustained because it was made to enforce the observance of an act of parliament which interested all the corporations in the kingdom. This authority, as well as others maintaining the same general conclusion, were fully approved in the case of *People agt. Collins* (19 *Wend.*, 56). And in the case of *People agt. Halsey* (37 *N. Y.*, 344), it was also held to be a matter of but slight importance whom the applicant or relator should be, so long as he does not officiously intermeddle in a matter with which he has no concern. The rule, it was said, "that a relator in a writ of *mandamus* must show an individual interest to the thing asked, must be taken to apply to cases where an individual right is alone involved, and not to cases where the interest is common to the whole community" (*Id.*, 348; *High on Extraordinary Remedies*, sec. 431, and cases cited in note). The rule is different in some of the states, but here it has become fixed and established, allowing every citizen the right to compel public officers, whose duty it has been made to do so, to execute the laws of the state enacted for the benefit of the community, and where the government is solely one of laws, as that of the state and the city most clearly are, the rule is one of a salutary and beneficial character.

Neither of the objections, which have been taken to the application, are capable of being maintained, and as the case has been held over with the expectation that the action of the common council might be voluntarily reconsidered in such a manner as to secure the observance of the law without a resort to this remedy, and that has not been done, no other alterna-

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tive remains but to direct that the writ of *mandamus* shall be issued. This writ will require the common council to proceed in good faith to the consideration of the estimate submitted for this contemplated expenditure by the mayor, and to allow it and include it in the estimates for the ensuing fiscal year, so far as it may be found requisite to do so for the maintenance and execution of the law. What the common council will be required to do is to consider and dispose of the estimate precisely the same as it does any other lawful estimate submitted for its action; to exercise its judgment carefully and intelligently upon the subject and to allow the estimate as it may have been submitted or as it may be altered or amended solely pursuant to the exercise of that judgment, guided by the facts which, in the faithful discharge of its duty, may be found to exist.

The order to be entered will be settled on notice to the city attorney.

SUPREME COURT — SPECIAL TERM.

RODERICK MORRISON agt. LYDIA LAWRENCE and ISAAC LAWRENCE.

Code of Civil Procedure, section 1019 — Rights of referees — What is a sufficient compliance with the provisions of section 1019 as to delivery of report — When the sixty days begin to run — Power of referees to enlarge time for submission of briefs.

The sixty days in which a referee must make his report do not commence to run until the cause is submitted.

Where briefs are to be submitted there is no submission of the cause until the time to hand in the briefs is passed.

The referee has power to enlarge the time for the submission of briefs.

Having his report ready and tendering it on payment of his fees, within the sixty days, is sufficient. (*See to same effect decision by general term, first department, Little agt. Lynch, 1 How. [N. S.], 95.*)

Special Term, June, 1885.

Morrison agt. Lawrence.

Motion by plaintiff to set aside the report of a referee and to vacate the judgment entered thereon on the grounds that the report was not filed within the time prescribed by section 1019 of the Code.

The testimony closed before the referee February 13, 1885, and at that time the counsel for the parties agreed to submit the case on written briefs, to be handed in within twenty days; before the expiration of the twenty days the defendants' attorney obtained from the referee an extension of the time to the middle of March, and on the thirteenth March he mailed his brief to the referee, which was received by him on the next day. On the twentieth day of April the referee notified the defendants' attorney that his report in favor of the defendants was ready for delivery on the payment of his fees. The defendants' attorney not having taken up the report, the plaintiff's attorney, on the eleventh day of May, served notice discontinuing the reference. On the twenty-fifth of May the defendants' attorney took up the report and served copy of the same on plaintiff's attorney on the next day, and afterward entered judgment.

Joseph Merritt, for plaintiff.

James L. Stewart, for defendant.

WESTBROOK, J. — The motion presents a close question, but I shall hold :

First. That the sixty days do not commence to run until the cause is submitted.

Second. When briefs are to be submitted there is no submission of the cases until the time to hand in briefs is passed.

Third. That the referee has power to enlarge the time for the submission of briefs, as he would have the power to postpone the argument of the cause beyond the day fixed, if the cause was to be submitted on oral argument. This is an inherent right or power of the referee, and unless his discretion in this

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particular is abused, the court will not interfere with his action.

Fourth. Having the report ready and tendering it, on payment of his fees, within the sixty days is sufficient (*Little agt. Lynch*, 34 *Hun*, 396; *Geib agt. Topping*, 83 *N. Y.*, 46). These decisions are contrary to *Phillips agt. Carman* (23 *Hun*, 150), but they are more recent. It is true the latter case was affirmed by the court of appeals (84 *N. Y.*, 650), but the affirmance may have been on some other ground (*see* 34 *Hun*, 400); and indeed we must so suppose, for in the case above cited from 83 *New York*, 46, the same court expressly decided contrary to it.

Motion denied, without costs. The defendants must stipulate to enable plaintiff to review the judgment.

SUPREME COURT.

AGNES REYHER executrix, &c., agt. CAROLINE REYHER and others.

Will—When real estate of the testator chargeable with payment of legacies.

The primary fund for payment of legacies is personal estate and realty, cannot be charged with the burden unless by express direction or clear intent drawn from the will, aided by outside circumstances if any there be.

The will of R., after directing the payment of his debts, directed his executors to pay to his father, mother, brother and sister, certain sums of money, and then directed that all the rest residue and remainder of his estate, both real and personal, be equally divided between his daughter and widow who was appointed executrix, giving her full power to sell and convert all the estate into money. The personal property was insufficient to pay the legacies in full:

Held, that the legacies were chargeable upon the real estate.

New York Special Term, April, 1885.

ACTION by the plaintiff for construction of the will of August Reyher, deceased. After directing the payment of

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his debts the testator directed his executor to pay to his father, mother, brother and sister, certain sums of money, and then directs that all the rest, residue and remainder of his estate, both real and personal, be equally divided between his daughter and his widow the plaintiff who was appointed executrix. The executor was given full power to sell and convey all the estate into money. The personal property was not sufficient to pay the legacies in full. A portion of the real estate had been sold by the plaintiff under the power of sale.

F. C. Steffen, for plaintiff.

E. Beneville, guardian *ad litem*, for infant defendant.

A. C. Anderson, for defendant, *F. Bruckman*.

R. Dulon, for other defendants.

BEACH, J. — It would be satisfactory to the court to construe this will in a way to increase the residuary estate for widow and child, whose interests are provided for in the residuary clause. To do so, however, would substitute another's ideas for those of the testator, as construed by frequent adjudication, and subvert legal authority often announced and impossible to weaken or avoid.

The primary fund for payment of legacies is personal estate, and realty cannot be charged with the burden unless by express direction, or a clear intent drawn from the will, aided by outside circumstances if any there be. The instrument at bar gives the legacies, after payment of debts and funeral expenses. The testator's parents, sisters and brothers are the beneficiaries. A direction to pay all within one year after death follows, and then a disposition of all the rest, residue and remainder of his estate, both real and personal, by division between wife and daughter.

This clause seems to contemplate a residuum of both real and personal property, and the absence of any prior devise of

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realty to create a residue, supports the inference of intention to charge it with the burden of legacies, should there be a deficiency in personalty. The question has frequently been before the courts, and I examined the adjudications in *Le Fevre agt. Toole et al.* (84 N. Y., 95), when presented at special term. The case of *Bevan et al. agt. Cooper et al.* (72 N. Y., 317), countenances no different conclusion. The intent of a testator is to be gathered from his will, consequently the modes of expression vary in every case. In the one last cited the residuary clause separated real from personal estate; there was a plain devise of realty, and the legacies were given to strangers.

With due regard to controlling authority, I do not think the conclusion can be avoided that the legacies here are chargeable upon testator's real estate.

Decree ordered charging legacies upon real estate.

NOTE. — No appeal was taken in the case. — [Ed.]

SUPREME COURT.

HENRY W. LEE, individually and as executor, etc., agt. EMMA F. LEE, individually and as administratrix.

Will—Construction of.

It is the duty of the court to ascertain from the will itself the intention of the testator, and if the provisions of the will are legal, to give effect to them according to the intention of the testator. Invalid provisions, as a matter of course, must fail.

By the will, one-half of the residuary estate was given to trustees, who were directed to receive the income thereof during the lifetime of the testator's son, H. W. L., and to pay the same to him so long as he should live. But upon his death, leaving a wife him surviving, one-quarter of the income was to be paid to her so long as she should remain unmarried. On his death, without leaving a widow, the whole of such share set apart for his benefit, or if he should leave a widow, three-quarters of such share was given absolutely and in fee to his

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children. But should his son leave "a widow," then at her death or remarriage the one-quarter of his share was disposed of in like manner as the rest of the share. H. W. L. was married at the time of his father's death, and he, as well as his then wife, are still living:

Held, that it would be premature, at this time, to pronounce this portion of the will invalid, for effect may be given to the testator's actual disposition of this one-quarter interest, in the event that H. W. L. should leave no widow at his death.

But as to the one-quarter interest of the one-half of the residuary estate continued in the trustees for the benefit of the widow of his son S. A. L., in the event that he should die leaving a widow, the case is different. S. A. L. died after the testator's death, leaving a widow and several children. These facts present the alternative condition, upon which the trust was to continue after the death of the testator's son, and upon which the gift to the children was made, and such trust is void, and as to this one-quarter of the one-half of the residuary estate, the testator in law died intestate. (*Osling Schettler agt. Smith*, 41 N. Y., 828.)

Where the will contained a gift of \$2,000, upon the death of the testator's wife, to his grandchildren "in being" at that time, such of them, however, as were under the age of twenty-three years to be paid their shares on arriving at that age:

Held, that grandchildren born after the testator's death, but during the lifetime of the widow, take a share of this gift. Grandchildren born after the death of the widow do not participate in this legacy. The statute disposes of the shares of the grandchildren who died intestate during the lifetime of the widow.

Held, also, that the grandchild H. F. L., although born after the death of his father S. A. L., is embraced within the terms of the gift to his children "then in being," and within the provisions of the statute, and the policy of the law should share equally with the brothers and sisters in the share set to his father.

The after-added provisions of the will, near its close, by which it is sought to continue the trust over the shares of minors in the residuary estate, is void in so far as the \$2,000 held for the life of Eliza Howe is concerned. That portion of the residuary estate has already been subjected to a trust for two lives.

The gift to the testator's grandchildren was made in absolute terms at the time they were limited to take effect, and the latter-added invalid trust may be dropped, and the principal sum should be paid to the persons entitled thereto, when entitled, as though such latter trust had not been attempted to be made.

Special Term, April, 1885.

Lee agt. Lee.

ACTION for the construction of the will of Frederick R. Lee, deceased.

G. Sackett, for plaintiff.

Ira O. Miller, for defendant Emma F. Lee.

C. M. Earle, for infant defendants.

Frank C. Lang, for other defendants.

VAN VORST, J. — The will of Frederick R. Lee was written by himself. It is drawn with a care not usually found in testaments written by one unfamiliar with the law applicable to wills, or the principles of construction which apply to such documents.

This will is presented for construction, and it is urged, on the behalf of the plaintiff and others interested in this controversy, that some of the provisions are ambiguous, and others invalid. It is the duty of the court to ascertain from the will itself the intentions of the testator, and, if the provisions of the will are legal, to give effect to them according to the intention of the testator. Invalid provisions, as a matter of course, must fail.

The first question which arises is in respect to the direction given to the principal sum of \$2,000, ordered by the testator to be invested for the benefit of the testator's sister, Eliza A. Howe.

I am of the opinion that such principal sum is disposed of after the death of the testator's sister by the residuary clause, and goes to the persons entitled under the will to the residuary estate. And if there be any invalidity in the disposition of the residuary estate, the disposal of that sum is affected thereby. The validity of the disposition of a part of the residuary estate is, however, assailed.

One-half of the residuary estate was given to trustees, who were directed to receive the income thereof during the lifetime of the testator's son Henry W. Lee, and to pay the same

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to him so long as he should live. But upon his death leaving a wife him surviving, one-quarter of the income was to be paid to her so long as she should remain unmarried. On his death without leaving a widow, the whole of such share set apart for his benefit, or if he should leave a widow, three-quarters of such share was given absolutely and in fee to his children. But should his son leave "a widow," then at her death or remarriage the one-quarter of his share was disposed of in like manner as the rest of the share. It is urged that as to the one-quarter of one-half of the residuary estate reserved for the benefit of the widow of the testator's son Henry W. Lee, should he leave a widow, the disposition made thereof upon her death or remarriage is invalid. In support of this contention I am referred to *Schetler agt. Smith* (41 N. Y., 328). That case has been repeatedly approved and followed in subsequent decisions.

Henry W. Lee was married at the time of his father's death, and he as well as his then wife are still living. Precisely those conditions existed in *Schetler agt. Smith* (*supra*). There Lawrence Smith, the testator's son, had a wife and issue living at the time of the making of the will, and also at the death of his father. It was held in the case above cited that, as the trust was to continue during the life of the widow of the testator's son, if he left a widow, it would include "any wife that might survive him." That it was possible that the son, on the death of his then wife, might marry a woman, "not in being" at the testator's death. And that under such circumstances, and in view of such possibility, the trust was void. The alternative condition, however, which ended the trust, in the event that the testator's son should die without leaving a widow, was held to be valid.

It would be premature, therefore, at this time to pronounce this portion of the will invalid, for effect may be given to the testator's actual disposition of this one-quarter interest, in the event that Henry W. Lee should leave no widow at his death.

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The case is, however, quite different with regard to the one-quarter interest of the one-half of the residuary estate, continued in the trustees for the benefit of the widow of his son Stephen A. Lee, in the event that he should die leaving a widow.

Stephen A. Lee died after the testator's death, leaving a widow and several children. And these facts present the alternative condition, upon which the trust was to continue after the death of the testator's son, and upon which the gift to the children was made, and which, in the case above cited, is declared to be void. The consequence is that, as to this one-quarter of the one-half of the residuary estate, the testator in law died intestate.

The language of GROVER, J., in *Schettler agt. Smith*, is express upon this point, for he says: "Should, therefore, Lawrence die, leaving a widow him surviving, the trust to convey to his, or the issue of the other children, being too remote and void, it would follow that the testator died intestate as to his portion of his estate, and that it would be disposed of under the statutes provided for such cases."

The opinion of DANIELS, J., in the same case, pages 346 and 347, is to the same effect. He says: "The final vesting of the will is rendered dependent upon the previous expiration of the widow's life estate," and "if the life estate fails, of course the remainder made dependent, and which it is provided shall take effect upon its termination, must also fall with it, for the event can never in that view of the case arise upon which the remainder was to become vested."

I am led to urge these last observations, because it has been argued by the learned counsel for the children of Stephen A. Lee, that the gift to them might still be upheld. Under the above case it cannot. It is urged in their behalf that the consequence of such decision will be to give the children of Henry W. Lee a portion of this quarter interest, and work an inequality in opposition to the testator's intentions. But such result cannot be avoided if the expressed intention,

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and we can gather the intention only from the will itself, be illegal.

The will contains a gift of \$2,000, upon the death of the testator's wife, to his grandchildren "in being" at that time, such of them, however, as were under the age of twenty-three years to be paid their shares on arriving at that age. Two grandchildren, Eliza C. and Frederick R. Lee, were excepted.

Grandchildren born after the testator's death, but during the lifetime of the widow, take a share of this gift. Grandchildren born after the death of the widow do not participate in this legacy. The statute disposes of the shares of the grandchildren who died intestate during the lifetime of the widow.

The grandchild Herbert F. Lee, although born after the death of his father Stephen A. Lee, is embraced within the terms of the gift to his children "then in being;" and within the provisions of the statute and the policy of the law should share equally with his brothers and sisters in the share set apart to his father (1 *R. S.*, 725, *sec.* 30; *Mason agt. Jones*, 2 *Barb.*, 229; 2 *R. S.*, 65, *sec.* 49).

The after-added provisions of the will, near its close, by which it is sought to continue the trust over the shares of minors in the residuary estate is void in so far as the \$2,000, held for the life of Eliza Howe, is concerned. That portion of the residuary estate has already been subjected to a trust for two lives.

The gift to the testator's grandchildren was, as has been already seen in a previous part of the will, made in absolute terms at the time they were limited to take effect. And the latter added invalid trust may be dropped, and the principal sum should be paid to the persons entitled thereto, when entitled, as though such latter trust had not been attempted to be made.

The testator omitted to name trustees over the share in the estate designed for his son Henry W. Lee, but there is sufficient in the will to indicate the persons intended by him to act as such trustees. Such persons were clearly Hiram M.

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Forrester and Marcus Sackett, and the blanks left in the will should be considered as filed with the names of three persons evidently in the testator's mind at the time he executed the will.

There was no equitable conversion of the real estate into personalty, as the power to sell was not imperative.

I think that the foregoing sufficiently covers all the questions which have been discussed, and will enable the counsel engaged to prepare the necessary findings of fact and conclusions of law.

The findings and conclusions should be made to carry out the views above expressed, and should be submitted to all the counsel engaged before being presented for signature, which may be done on the first Monday of May next.

CITY COURT OF NEW YORK.

BANNERMAN agt. QUACKENBUSH *et al.*

Costs — Taxation of — Offer of judgment by one of several partners — Code of Civil Procedure, sections 738, 1278, 1982.

Where defendants were sued as partners upon a partnership indebtedness, and one appeared and defended the action, the other defendant not being served with process and not appearing, the one appearing served an offer to allow judgment to be taken "*against him*" for sixty-five dollars and fifty-four cents, with interest and costs. The plaintiff recovered a judgment against the defendants "*jointly*" for seventy-two dollars and ninety-one cents, but this included interest, so that the judgment, "*in amount,*" is not more favorable than the offer:

Held, that a joint judgment could not have been entered upon the offer; and, therefore, the recovery is more favorable, as it is enforceable against the joint property of both defendants, as well as the property of the defendants served, and the plaintiff is entitled to tax his costs.

Special Term, July, 1885.

MoADAM, C. J.—The defendants are sued as partners upon a partnership indebtedness. The defendant John E. Quack-

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enbush appeared and defended the action. His co-defendant was not served with process and did not appear. John E. served an offer to allow judgment to be taken "against him" for sixty-five dollars and fifty-four cents, with interest from January 27, 1883, with costs. The plaintiff recovered a judgment against the defendants "jointly" for seventy-two dollars and ninety-one cents, but this included interest, so that the judgment, "in amount," is not more favorable than the offer. The question presented is, whether the circumstance that the judgment recovered is a joint judgment against both defendants makes the recovery more favorable to the plaintiff than the offer of John E., which, in terms, was to allow judgment to be taken against "him" only. This depends upon the legal effect of the offer made. If a joint judgment could have been entered upon the offer, the judgment recovered is not more favorable. If a joint judgment could not have been entered on the offer, the recovery is more favorable, because it is enforceable against the joint property of both defendants, as well as the separate property of the defendant served (*Griffiths agt. De Forest*, 16 *Abb. Pr.*, 292).

The Code (*sec.* 1278) provides that "one or more joint debtors may confess a judgment for a joint debt, due or to become due. Where all the joint debtors do not unite in the confession, the judgment must be entered and enforced against those only who confessed," &c. The Code, in regard to offers to allow judgment (*sec.* 738), provides that "the defendant may, before the trial, serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum, or property, or to the effect therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken." The present action was not severed, nor was it capable of severance, so that a separate judgment could have been taken against the defendant who made the offer (*Code, sec.* 1932; *Niles agt. Battershall*, 2 *Robt.*, 146; 18

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Abb. Pr., 161; 27 *How. Pr.*, 381; *Nelson agt. Bostwick*, 5 *Hill*, 37).

There seems to be no reported case construing this provision of the Code, excepting *Garrison agt. Garrison* (67 *How. Pr.*, 271), wherein it was decided that there is no statutory authority allowing one joint debtor or partner to make an offer of judgment in behalf of his joint debtor or copartner, and that section 738 only applies to cases where a separate judgment must be taken against him who makes the offer; and that section 1392 of the Code, allowing judgments to be entered in form against both joint debtors when one only is served, does not relate to judgments entered upon offers. This construction seems to be in harmony with the evident intention of the codifiers, and accords with *Everson agt. Gehrman* (1 *Abb. Pr.*, 167); *Binney agt. Le Gal. (Id.*, 283; 10 *How. Pr.*, 301; 19 *Barb.*, 592; 2 *Law Bull.*, 53). Offers to allow judgment are to be construed most strongly against the parties making them, as they have it in their power to choose their own language and make them definite and in accordance with every requirement (*Bettis agt. Goodwill*, 32 *How. Pr.*, 142). Under the circumstances the joint judgment recovered by the plaintiff was more favorable than the offer, and it follows that the plaintiff is entitled to tax his costs.

The taxation by the clerk in favor of the defendant will, therefore, be reversed and the clerk ordered to retax in accordance therewith.

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SUPREME COURT.

In the Matter of the Application of BENJAMIN CASE agt.
ANDREW CAMPBELL for the delivery of books and papers.

Appeal—Stay of proceedings—Officer—Books and papers—proceedings by officer to compel delivery of books not to be used to try title to office.

A stay of proceedings should not be vacated pending appeal when such an appeal presents reasonable questions for review.

A person who takes proceedings under the Revised Statutes, to compel the delivery by another to him of the books and papers of an office, should at least show a *prima facie* title to the office, and this would be properly proved by the official canvass showing claimant to have received the greatest number of votes.

Such proceedings to compel the delivery of books, &c., are not to be used to try the title to an office; and when the result of an election is declared by the official canvassers, a county judge has no power, upon such an application, to take evidence and determine the result of an election.

Ulster Special Term, May, 1883.

MOTION to vacate a stay pending an appeal to the general term of this court, from an order of the county judge of Sullivan county.

Mr. Butts, for motion.

Mr. Thomson, opposed.

WESTBROOK, J. — On the 23d day of April, 1883, the Hon. William L. Thornton, the county judge of Sullivan county, made an order that Andrew Campbell deliver over to Benjamin Case, as the supervisor of the town of Forestburgh, Sullivan county, the books and papers belonging to the office of supervisor of such town. From that order an appeal was taken in behalf of Campbell to the general term of this court, and a stay of all proceedings before the county judge, pending such appeal, was granted by the judge writing this

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opinion on the 24th of April, 1883. A motion is now made to vacate such stay.

Stays of the character sought to be vacated should not, as will be conceded, be granted unless there is reasonable cause for the appeal. Without intending in the slightest degree to prejudice the proceeding taken in behalf of Mr. Case, or to criticize the decision of the county judge, it is proposed very briefly and succinctly to state the reasons why such stay should be continued.

Mr. Andrew Campbell, it is admitted, was duly elected supervisor of the town of Forestburgh in March, 1882. Both he and the applicant, Benjamin Case, were candidates for the office at the town meeting held March 6, 1883. At the close of the poll on that day each, according to the canvass then made, received 105 votes. Two ballots folded closely together were not then opened or counted, and the board adjourned to March 10, 1883, for further consultation. On the tenth the ballots were opened and found to be for Case. The board did not decide whether the ballots should be counted or not, being equally divided in opinion.

The provisions of the statutes (1 *R. S.* [7th ed.], 816, 817), are :

"Sec. 7. At the close of every election by ballot the presiding officers shall proceed publicly to canvass the votes, which canvass, when commenced, shall be continued without adjournment or interruption until the same be completed.

SEC. 8. Before the ballots are opened they shall be counted and compared with the poll list, and the like proceeding shall be had as to ballots being folded together, and as to difference in number, as are prescribed in the fourth title of the sixth chapter of this act.

"Sec. 9. The canvass being completed, a statement of the result shall be entered at length by the clerk of the meeting, in the minutes of its proceedings to be kept by him as before required, which shall be publicly read by him to the meeting, and such reading shall be deemed notice of the result of such

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election to every person whose name shall have been entered on the poll list as a voter."

From the foregoing facts and the extracts from the statutes, it will be seen that the county judge did not have before him any certificate or statute evidence showing that Case was elected supervisor. He proceeded, however, by an inquiry into the election to ascertain and determine the result. In other words, he determined that the two ballots folded together should have been counted for Case, and that the board of inspection erred in not so counting them, and in failing to have the clerk record the result as the statute directs. This was, I think, beyond the power of the county judge upon this summary application. If Case had held the legal evidence of election he would have been justified in making the order, and if Campbell had been dissatisfied his remedy would have been an action in the name of the people to recover the office. But in the absence of the *prima facie* evidence of Case's election, there was no power vested in the county judge to ascertain and declare the result of the election (*The People agt. Stevens*, 5 *Hill*, 616; see, also, *opinion of Kent, Civ. J., in same case in note on pages 633, 634; Matter of Baker*, 11 *How. Pr. R.*, 418; *Matter of Davis*, 19 *How.*, 323). When neither party has the legal evidence of his election to office, the remedy of the one desiring to obtain possession is by action.

No opinion is expressed upon the merits of the election, nor as to the propriety of the allowance of the votes to Mr. Case, but as to such allowance there is also some question (*See sec. 8 of R. S., above quoted; also same volume of statutes, pp. 388, 389, sec. 37*).

The result of my examination is that the stay should not be vacated pending the appeal, as such appeal, in my judgment, presents very reasonable questions for review.

NOTE.—The general term reversed the decision of the county judge in the above case (17 *Weekly Digest*, 473), thereby sustaining the reasoning of the foregoing opinion.—[ED.]

Alvord agt. Hetsel.

SUPREME COURT.

SUSAN ALVORD, plaintiff, agt. JOHN HETSEL, defendant.

Complaint — Necessary averments in action to recover real estate.

The complaint in an action to recover real estate ought to aver that the plaintiff is the owner or seized in fee, and is entitled to the possession or that defendant wrongfully or unlawfully withholds possession from plaintiff.

Montgomery Special Term, April, 1885.

DECISIONS on demurrer to complaint.

John M. Gardner, for plaintiff.*E. Blair*, for defendant.

FISH, J. — I think the complaint in an action to recover real estate ought to aver that the plaintiff is the owner or seized in fee, and is entitled to the possession, or that defendant wrongfully or unlawfully withholds possession from plaintiff.

The complaint is defective in these particulars. The defendant may be rightfully in possession even though the fee is in the plaintiff (14 *How. Pr.*, 439; *Ensign* agt. *Sherman*, 4 *Abb. Pr. R.*, 307; 16 *How.*, 308; *Saunders* agt. *Leroy*, 23 *Bosw.*, 228; *Walter* agt. *Sackwood*, 28 *Bosw.*, 240; *People* agt. *Mayor*, 31 *Hun*, 296; *Van Voorhees* agt. *Kelly*, opinion by DANIELS, J.).

Demurrer sustained.

NOTE. — Abbot's Forms (pp. 513, 514) unfavorably affected by decision.
[Ed.]

Kiernan agt. Reming.

NEW YORK SUPERIOR COURT.

PATRICK KIERNAN, plaintiff, agt. MARGARET REMING,
defendant.

*Injunction in summary proceedings — Code of Civil Procedure, sections
2239 to 2265.*

The court may restrain, by injunction, summary proceedings, if the justice goes beyond his jurisdiction, either in taking cognizance of the proceedings or while he is acting in it, and if it appears that the justice who granted the warrant, the enforcement of which is sought to be restrained, was without jurisdiction, the injunction should be continued. A justice has no power in summary proceedings to adjourn the same except for the purpose of enabling a party to procure his necessary witnesses.

Where, upon the return of the precept, the tenant filed a verified traverse of the return and moved to dismiss the proceedings, and the justice, after hearing the testimony of the parties as to the service of the precept instead of rendering his decision upon the close of the evidence, adjourned the proceedings for the purpose of decision :

Held, to operate as a discontinuance of the proceedings.

A justice, other than the one before the precept is returnable, has no jurisdiction to issue the warrant.

Special Term, June, 1885.

Motion to continue injunction to restrain the defendant from enforcing a warrant to dispossess the plaintiff from certain premises under a final order.

The opinion states the facts.

William H. Kelly and Leonard A. Giegerich, for plaintiff and motion.

Henry C. Botty and John W. Goff, for defendants and opposed.

INGRAHAM, J. — Summary proceedings for the recovery of the possession of real property in the city of New York are regulated by the Code of Civil Procedure. By sections 2239

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and 2265, inclusive, the proceedings statutory must be strictly followed to give the court jurisdiction.

In *Chadwick agt. Bray* (1st Code of Civil Pro. R., 425) it is held that if the justice goes beyond his jurisdiction, either in taking cognizance of the proceeding or while he is acting in it, the court may restrain, and if it appears that the justice who granted the warrant, the execution of which is sought to be restrained, was without jurisdiction, the injunction should be continued.

Section 2243 provides that at the time the precept is returnable the petitioner must, unless the adverse party appears, make due proof of the service of the precept. In this case the adverse party appeared, but for the purpose of objecting to the service, and the court proceeded to take proof of the service of the precept.

Section 2249 provides when a final order awarding the petitioner the possession of the property shall be granted.

First, If sufficient cause is not shown upon the return of the precept, and

Second. Where there is a verdict of the jury, or a decision of the justice upon the trial in favor of the petitioner.

In this case no answer was interposed and there was no trial before the magistrate. It was the duty, therefore, of the justice present when the precept was returnable, if sufficient cause was not there shown, to have made the order awarding the petitioner the possession of the property. Such an order was not made, however, and an adjournment was taken for the purpose of decision. This adjournment was not taken at the request of the plaintiff, nor with his express consent. He insisted at the time that the proceeding should be dismissed.

It has been decided by the general term of this court, that where there is no provision of the statute authorizing an adjournment and an indefinite adjournment or postponement is taken for deliberation and decision, that the proceedings are discontinued and the justice or the court loses jurisdiction.

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(*Boller agt. Mayor, etc.*, 40 *N. Y. Supr. Ct. Repts.*, 537.)

The only provision for the adjournment of these proceedings is contained in section 2248 of the Code, which provides that at the time when issue is joined, the judge or justice may in his discretion, at the request of either party and upon proof to his satisfaction by affidavit or orally, that an adjournment is necessary to enable the applicant to procure his necessary witnesses, or by consent of all the parties who appear, adjourn the trial of the issue.

This section would not authorize the adjournment in the case at bar. There no answer was interposed. There was no issue joined, and there could be therefore no necessity for an adjournment to procure witnesses.

In *Boller agt. Mayor (supra)* it was held that by expressly authorizing an adjournment for a specific purpose, and on a specific condition the statute impliedly prohibited all adjournments except such as are expressly authorized, and that by an unauthorized adjournment the magistrate before whom the proceedings were pending exceeded his jurisdiction, and his future proceedings are void. The adjournment in this case, therefore, under this authority worked a discontinuance of the proceedings, or at any rate a justice, other than one before whom the precept was returnable, had no jurisdiction to issue the warrant. The warrant issued, therefore, was void.

I think, however, the security given by the plaintiff is insufficient, and the plaintiff should give an undertaking in the sum of \$2,500, that he pay all damage sustained by the defendant in case it should finally appear that he was not entitled to an injunction. On giving such a bond the injunction is continued, plaintiff to have ten dollars costs of this motion to abide the event.

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COURT OF SESSIONS.

THE PEOPLE agt. JAMES J. WISE.

Indictment must show on its face a criminal offense — Election law — Penal Code, section 94 — Offense under — Penal Code, section 649 — What cases it covers — Repugnancy a fatal objection to an indictment.

The provisions of the Code of Criminal Procedure relating to indictments should be construed with the common law principles of pleading, and where no provision is made by the Code, the common law rule should prevail.

The Code has not changed the common law rule that an indictment must show on its face a criminal offense.

Under the general election laws the return of the results of an election to be given to or filed with the supervisor of the town or ward in which the election was held, must be the original return and not a mere certified copy.

Accordingly, where it appeared on the face of an indictment that a copy of a return was given to and filed with the supervisor of a ward, and that it was mutilated by him, no offense is shown under section 94 of the Penal Code, as it was not filed or deposited with him "by authority of law."

To constitute an offense against a statute for the protection of a document or paper of any kind, it must appear to be the kind of document or paper specified in the statute.

Section 649 of the Penal Code covers only cases of a messenger appointed by authority of law, or any person who interferes with such messenger. Repugnancy (there being two inconsistent allegations in one pleading) is a fatal objection to an indictment since, as before the Code of Criminal Procedure.

Cases stated as to how and when the words and figures of a document or paper should be set forth in an indictment.

Albany county, June, 1885.

Before Hon. JOHN C. NOTT, county judge, and associates.

THE defendant filed a demurrer to the indictment found against the defendant. The indictment is as follows:

The grand jury of the county of Albany, by this indictment, accuse James J. Wise of the crime of willfully and

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unlawfully, feloniously injuring and mutilating a document and paper filed with a public officer by authority of law, in violation of section 94 of chapter 676 of the Laws of the state of New York, passed July 26, 1881, entitled "an act to establish a penal code," committed as follows: The said James J. Wise, on the 7th day of November, 1884, at the city of Albany, in this county, was a public officer of the state of New York, to wit: was the supervisor of the Twelfth ward of the city of Albany, in the county of Albany, in said state of New York, and had therefore duly qualified, and was then and there acting in the discharge of the duties of such supervisor and public officer, and while he, the said James J. Wise, was so acting as aforesaid, he did then and there have in his possession and custody a certain paper document instrument and writing which he, the said James J. Wise, as such supervisor, had theretofore duly received from the inspectors of the western election district of the said Twelfth ward of the said city of Albany, the same purporting to be and being the statement of the canvass of the votes cast at an election held in the said western election district of the said ward, on the 4th day of November, 1884, in the said city of Albany, and which said paper document instrument and writing, so described as aforesaid, was theretofore duly delivered to and filed and deposited with him, the said James J. Wise, as such supervisor and public officer, by authority of law, by the said inspectors of election, and was, in the words and figures and in substance following to wit:

"CERTIFICATE OF CANVASS.

"Statement of result of a general election held in and for the western election district of the Twelfth ward of the city of Albany, held November 4, 1884.

(Then follows the vote in detail, concluding with two certificates as follows):

"We certify that the foregoing statement is correct in all respects." (Dated and signed by inspectors.)

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"We certify that the foregoing is a true copy of the original statement for the board of county canvassers.

"Dated this 4th day of November, 1884." (Signed by the inspectors.)

And the said James J. Wise, on the said 7th day of November, 1884, of the city and county aforesaid, did unlawfully, fraudulently, deceitfully and feloniously injure, mutilate, obliterate and alter, and did willfully, unlawfully, fraudulently, deceitfully and feloniously cause to be injured, mutilated, obliterated and altered, the said instrument, writing, document, paper and statement so described as aforesaid, and did willfully and unlawfully aid and assist in the injuring, mutilating, obliterating and altering of the same by falsely making, forging and willingly acting and assisting in the false making and forging on the eighteenth line of the third page thereof, the words four hundred and ninety-nine and the figures 499; and on the nineteenth line of the said third page thereof, the words two hundred and twenty-nine and the figures 229; and on the fourth line of the fourth page thereof, the words six hundred and seven and the figures 607; and on the fifth line of the said fourth page thereof, the words one hundred and eighteen and the figures 118, and did falsely, fraudulently, unlawfully and willfully mutilate, obliterate and destroy, on the said eighteenth and nineteenth lines of the said third page thereof, the words four hundred and fifty-nine and the words two hundred and sixty-nine, and the figures 459 and the figures 269, and did alter and change the same willfully and unlawfully, and did willfully and unlawfully substitute in lieu thereof respectively the words four hundred and ninety-nine and the figures 499 on the said eighteenth line, and the words two hundred and twenty-nine and the figures "229" on the said nineteenth line thereof, and did fraudulently, unlawfully and willfully mutilate, obliterate and destroy on the said fourth and fifth lines of the said fourth page thereof, the words five hundred and forty-four and the words one hundred and

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eighty-one and the figures 544 and the figures 181, and did then and there change and alter the same and did cause the same to be changed and altered, and did then and there willfully and unlawfully substitute and cause to be substituted instead and in lieu thereof respectively the words six hundred and seven and one hundred and eighteen, and the figures 607 and 118 respectively, and did then and there aid, abet and assist in the willful and unlawful mutilation, obliteration, concealment and destruction of the words and figures so described as aforesaid, and the false and fraudulent altering and changing of the same, and the willful and unlawful substitution instead and in lieu thereof of the words and figures so described as aforesaid, with the intent to defraud.

Second. And the grand jury aforesaid, by this indictment, accuse James J. Wise of the crime of willfully and feloniously mutilating and defacing, obliterating and destroying a certificate of a statement relating to the result of an election, in violation of section 649 of chapter 676 of the Laws of the state of New York, passed July 26, 1881, entitled an act to establish a penal code, committed as follows: The said James J. Wise, on the 7th day of November, 1884, at the city of Albany, in this county, did have in his possession a certain instrument, writing, document and paper commonly called and known as a certificate of canvass, the same being then and there and purporting to be the certificate of a statement relating to the result of an election, duly made and signed by the inspectors of election of the twelfth ward, western district of the said city of Albany, and which said election was had and held in the said western district of the said twelfth ward of the said city of Albany, for the said district, ward and city and for the said county of Albany and state of New York, on the 4th day of November, 1884, and at which said election there was to be elected a county treasurer and a coroner, and for which said offices there were candidates voted and balloted for, and the said certificate of canvass contained and purported to contain a true statement

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of the ballots and votes cast for each candidate for said offices, and was in the words and figures and substance following, to wit: (Same as in first count.)

And he the said James J. Wise, so as aforesaid having the said certificate of canvass and statement so described as aforesaid in his possession, and did then and there willfully, unlawfully and feloniously mutilate, tear, deface, obliterate and destroy the same and especially did willfully mutilate, tear, deface, obliterate and destroy, and did willfully cause to be mutilated, torn, defaced, obliterated and destroyed, and did willfully, and unlawfully, and feloniously aid, abet and assist in the mutilation, tearing, defacing, obliteration and destruction of the eighteenth and nineteenth lines of the third sheet and the fourth and fifth lines of the fourth sheet thereof by falsely, fraudulently, willfully and feloniously, erasing, obliterating, changing, altering, destroying and defacing in the lines aforesaid, and on the sheets aforesaid the words and figures thereon placed, and substituting in lieu and instead thereof unlawfully and willfully other words and figures of a different import and conveying a different meaning, and did willfully cause the same to be erased and mutilated, obliterated, defaced, changed, altered and destroyed, and the said substitution to be so made as aforesaid, and did willingly, feloniously and willfully, aid, abet and assist the erasing, mutilating, obliterating, defacing, changing, altering and destroying the said words and figures on the lines and sheets aforesaid, and did willingly, feloniously and willfully, aid, abet and assist in the substituting therefor the other words and figures of a different import as aforesaid as to the relative number of ballots and votes respectively cast for the candidate for the offices aforesaid described and referred to said certificate of canvass."

Edward J. Meegan, for defendant.

D. Cady Herrick, district attorney, for the people.

Norr, Co. J.—The indictment contains two counts predicated on sections 94 and 649 of the Penal Code, respectively. To

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the indictment and severally to each count the defendant demurs, and specifies grounds authorized by section 323 (*subs. 4 and 5*) of the Code of Criminal Procedure. The points made to sustain the demurrer are briefly these:

First. That the indictment should set forth, and also purport to do so, the election returns alleged to be forged and destroyed, and that the words of the indictment, "and was in the words and figures and in substance following, to wit," are insufficient.

Second. That the first count is defective because there was authority of law for the defendant as supervisor to receive the original returns only from the inspectors, whereas the paper set forth in the indictment is merely a certified copy of the original.

Third. The second count is not brought within the language of section 549 of the Penal Code, and is void for repugnancy.

The district attorney answers these points by claiming that the arguments to sustain them are mere legal refinements and are inconsistent with the provisions of the Code of Criminal Procedure.

Independent of the recent authority of the *People agt. Isaacs* (1 *N. Y. Crim. R.*, 148), which enforces the common law rule of pleading in reference to explaining an ambiguous expression by an innuendo, and sustaining a demurrer to an indictment for libel for its absence, I should be disinclined to hold that it was the intention of the legislature in enacting the Criminal Code to prohibit courts from looking at and applying well-settled rules of the common law to present criminal pleadings and practice, and substitute a practically undefined system necessarily so from the absence of precedents, involving us in doubt and uncertainty for the plain and logical rules of the common law. When the Code directly or indirectly makes any provision, it must prevail; but if it is silent, good sense requires we should take our learning and rules from decisions of the courts.

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The Code of Civil Procedure, adopted in 1848, was fully as sweeping as the recent Code of Criminal Procedure; and in construing it the courts hold, in this language: "The legislature, in adopting the Code of Procedure, intended to preserve as many of the rules of the common law as are consistent with the new form of pleading" (*Knowles agt. Gee*, 8 Barb., 300; *Boyce agt. Brown*, 7 id., 80; *Howard agt. Tiffany*, 3 Sandf., 695; *Wooden agt. Waffle*, 6 How. Pr., 145).

Under the Code of Criminal Procedure, an indictment must contain "a plain and concise statement of the act constituting the crime, without unnecessary repetition" (*sec. 275*); and words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning (*sec. 282*); and, also, words used in a statute to define a crime need not be strictly pursued in an indictment, but other words conveying the same meaning may be used (*Sec. 283*). By sections 289, 290 and 291, special rules are provided for certain contingencies in cases of forgery and perjury. An indictment is declared to be sufficient if the act or omission charged as the crime is plainly and concisely set forth, and is stated with such a degree of certainty as to enable the court to pronounce a judgment upon a conviction according to the right of the case (*Sec. 284*). I take it that these provisions of the Code require that an indictment should show upon its face a criminal offense, and should do so with reasonable certainty; otherwise the section of the Code providing for a demurrer would be meaningless, for section 323 provides, as a good ground of demurrer, "that the facts stated do not constitute a crime."

If on an examination of the indictment I find that no offense is charged by it, and with reasonable certainty, it will be the duty of the court to sustain the demurrer. If, on the contrary, the indictment fairly construed in the light of the Code provisions and the rules of common law so far as applicable, sufficiently charges a crime or crimes, the demurrer

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must be overruled. I do not think that judges should be over-nice in looking for loop-holes to set aside indictments, but if fundamental principles are violated there should be no hesitation in doing so.

Does the first count charge a criminal offense? The intention of the pleader evidently is, and as it is expressed in the count, to make out a case under section 94 of the Penal Code; that section enacts, "a person who willfully and unlawfully removes, mutilates, destroys, conceals or obliterates a record, map, book, paper, document or other thing filed or deposited in a public office, or with any public officer, by authority of law, is punishable," &c. This count, in brief, charges a mutilation by the defendant of a return of the western election district of the twelfth ward of the city of Albany, filed with him as supervisor of that ward, and sets forth a copy of the return, which it avers was filed with him, and at the end and as a part thereof has a certificate in these words: "We certify that the foregoing is a true copy of the original statement made by us for the board of county canvassers. Dated this 4th day of November, 1884," and signed by three inspectors of election.

In order to bring a case within this section of the Penal Code, it must appear that the instrument mutilated was filed or deposited with the defendant as a public officer by authority of law, unless therefore the return filed with the defendant was the one the law required him to receive, any mutilation thereof is not within this section. The section does not denounce the mutilation of every paper, but only where the paper is filed or deposited "by authority of law." In the *State agt. Farrard* (3 *Hals.*, 333) it appears that a statute existed punishing as a crime to "willfully, unlawfully and maliciously tear, cut, burn, or in any other way whatever destroy any transfer or an assurance of money stocks, goods, chattels or other property whatsoever." Farrard having tore an instrument which acknowledged the receipt of certain rye to be sown on shares, it was *held*, first, it was not an instrument

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within the statute and hence no crime was committed, and, secondly, that the instrument set out in the indictment must appear to be papers of which the crime can be committed. In *Ayers agt. Covill* (18 Barb., 263) it was held that under the statute for stealing a record, etc., if the paper was wholly unauthorized and void it was not within the statute; that the instrument must be the one prescribed by the statute in order to make a crime (*See Rex agt. Morton*, 12 Cox's *Crim. Cases*, 456.) The elementary writers are equally explicit. "When the statute makes a forgery of a particular kind indictable, the indictment must show it to be such, and a variance is fatal" (2 *Whart. Crim. Law*, sec. 1467 and cases). Though an allegation cover the statute, still if it contains also allegations which shows the acts are not within the statute, it will be insufficient (*Bish. Stat. Crimes* [2d ed.], sec. 621.)

The same author says the act forbidden by a statute must be fully done in all its parts, else the offense is not complete (*Bish. on Stat. Crimes*, sec. 225). In *Fadner agt. The People* (2 *N. Y. Crim. Rep.*, 553) the defendant was indicted for the forgery of a certificate of a county clerk to an alleged copy of a decree of divorce; the certificate was not in the form prescribed by the Code, and it was held to be void, and therefore did not furnish the basis for an indictment for forgery (3 *Fields' Lawyers' Briefs*, sec. 538; 2 *Bish. Crim. Law*, [7th ed.], sec. 533; 1 *Whart. Prac. and Pleadings* [4th ed.], pp. 271, 281; *Vincent agt. The People*, 5 *Park.*, 100).

An examination of the statutes prescribing the duties of inspectors of election and of supervisors, as affecting election returns, must now be made, that we may determine the kind of return that should have been filed or deposited with the defendant.

The duties imposed upon inspectors of election in relation to canvass and returns are as follows:

(1.) The canvass shall be completed by ascertaining how many ballots, etc. (1 *R. S.* [7th ed.], 389, sec. 42). (2.) A separate canvass shall be made of presidential and vice-presi-

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dential ballots (*Id.*, sec. 43). (3.) The statement to be made by inspectors of the result of the election shall contain a caption stating the day on which, the number of the district, the town or ward and the county at which the election was held, in relation to which such statement shall be made. Also, showing the whole number of ballots taken for each person, designating the office for which they are given, and at the end thereof a certificate that such a statement is correct in all respects, which certificate shall be subscribed by the inspectors (*Id.*, sec. 44). (4.) "A true copy" of the several statements made by the inspectors shall be made and certified by them and immediately filed by them in the office of the clerk of the town or city (*Id.*, sec. 45). (5.) The original statement, duly verified, shall be delivered by the inspectors, or by one of them, to be deputed for that purpose, to the supervisor of the town or ward within twenty-four hours after the same shall have been subscribed (*Id.*, sec. 45). In addition to the foregoing a duplicate return is to be filed in the county clerk's office (*Laws of 1880, chap. 56, sec. 14, p. 158*). To summarize, the inspectors must (1), as a body, or by one deputed for that purpose, deliver the *original* statement, duly certified, to the supervisor of the ward; (2) file a true copy of the statement, duly certified by them, in the town or city clerk's office; (3) file a duplicate return in the county clerk's office.

Referring to the duties of supervisors in reference to election returns, the statute is clear and distinct, requiring the *original* statement or return to be delivered to the supervisor, and in no case does it contemplate or authorize him to receive a copy thereof (1 *R. S. [7th ed.]*, 390, 391, 392, *secs. 1, 5, 6, 12, 16 and 17*). The statutes recognize four several different forms of returns: First. An original to be given to the supervisor. Second. A true copy to be filed in the town or city clerk's office. Third. A certified copy to be obtained by the county clerk when the county canvass cannot proceed for lack of returns. Fourth. A duplicate under the act of 1880, to be filed in the county clerk's office.

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It appears on the face of the indictment that the return charged to be mutilated was not an original return, but a certified copy thereof. A copy could not take the place of the original, so far as the supervisor was concerned. As the paper set forth in the first count was not such an one as the defendant, as supervisor, should have filed, as deposited with him "by authority of law," the first count cannot consistently, with the common-law rules of pleading, or under the provisions of the Code, be sustained, and the demurrer to this count must therefore be allowed.

The second count proceeds under section 649 of the Penal Code, which provides: "A messenger appointed by authority of law to receive and carry a report, certificate or certified copy of any statement relating to the result of any election, who willfully mutilates, tears, defaces, obliterates or destroys the same, or does any other act which prevents the delivery of it as required by law; and a person who takes away from such messenger any such report, certificate or certified copy, with intent to prevent its delivery, or who willfully does any injury or other act in this section specified, is punishable," etc. This section is evidently leveled against two classes of persons: first, a messenger appointed by authority of law; second, any person who interferes with such messenger.

It is modeled on 1 Revised Statutes (6th ed.), page 449, section 8, which was directed against misconduct of messenger or those who interfere with them. The words "or who willfully does any injury or other act in this section," do not enlarge the scope of the section, or affect any person except one who interferes with a messenger. This becomes plain when we recall that section 94 of the Penal Code makes provision for all cases of injury to returns, whether copies or originals, as they must be filed and deposited in a public office or with a public officer, and it would be unreasonable to so construe section 649 as to make a double crime of one act. The law forbids that statutes are to be so construed as to multiply crimes or felonies. (*Bish. St. Cr.* [2d ed.], sec. 218;

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Com. agt. Macomber, 3 Mass., 439; Com. agt. Keniston, 5 Pick., 420.) The necessity for section 649 becomes apparent when it is remembered that section 94 does not cover the case of a messenger, who may not in certain cases be a public officer, but may be a mere servant or employe of a public officer.

This count fails to allege (1) that the defendant was a supervisor, or (2) that he was a messenger, or (3) that he took the certificate from a messenger, or (4) that the certificate was to have been used for any legal purpose, or that such use was prevented; and, therefore, it appears on the face of this count, in the language of the Code, "that the facts stated do not constitute a crime" (*Code of Crim. Pro., sec. 323*).

It was a well settled rule of common-law pleading, that when the words of a document are essential ingredients of an offense, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, libel (*Whar. Cr. Pl. and Pr. [8th ed.], sec. 167*), or a challenge to fight, or for printing, publishing or distributing obscene papers (*Com. agt. Tarbox, 1 Cush., 66; 66 n*), the document should be set out in words and figures, and the indictment must profess to set out the paper (*Com. agt. Wright, 1 Cush., 62; 2 Field's Lawyers' Briefs, sec. 348; 3 id., sec. 543*); and the words "in substance" was not complying with the rule (*Com. agt. Wright, supra*), nor was "purport" sufficient (1 *Whart. Pr. and Pl. [4th ed.], 264*), and the words "to the tenor following," or "as follows" were the proper words to use (1 *Whart. Pr. and Pl., supra*). If it was intended by the legislature to abolish these rules, it seems strange that special provision should be made in the Criminal Code for pleading in cases of libel (*sec. 289*), loss or destruction of papers in cases of forgery (*sec. 290*) and in perjury (*Sec. 291*).

It seems to me that the safer rule in all these cases not expressly provided for in the Code, is to follow the mandates of the common law pleading. If these rules prevail, both counts of the indictment would fail.

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The defendant claims that the second count is bad on its face for repugnancy, which is defined to be "two inconsistent allegations in one pleading" (1 *Bish. on Crim. Pr.*, sec. 489), and the argument is that as both allegations cannot be true, and there is no means of ascertaining which is meant, the whole will be as though neither existed, leaving the indictment inadequate. (1 *Bish. Crim. Pr.*, *supra*). I am of opinion this rule is still in force. The Code commands the crime to be stated in the indictment plainly and concisely, and without unnecessary repetition (sec. 275), and if there be inconsistent and incongruous allegations in a count, the crime cannot be said to be stated plainly or at all.

The defendant's argument is that the charging part of the indictment alleges a tampering with a certificate of a statement relating to the result of an election, and afterwards sets forth a mere copy of a statement.

In *Roberts agt. State*, an indictment for forgery alleged the purport of the forged instrument to be a "check for money on the City Bank of Dallas," and also set out the instrument *hæc verba*, thereby showing it to be a check on a "city bank" without designation of place. It was held bad (2 *Texas Court of Appeals*, 4; *State agt. Bean*, 19 *Vt.*, 539; *Heard's Cr. Pl.*, 180; *Downey agt. State*, 4 *Mo.*, 572).

This count was drawn on the theory that there was no discrimination in the form of returns; but there is a marked difference, and if the rules of the common law were to be applied, this count falls within the rule.

In determining this demurrer we are confined to what appears on the face of the indictment. We cannot look beyond it, nor inquire as to proof, or what testimony might be offered. No authority is given the court to wander from the record before it, and it is upon the record, unaided by extrinsic matter, the questions raised must be decided. In allowing the demurrer, as the court feels bound to do, it is proper to say that the district attorney is no way responsible for this result. It is not his duty to make the returns of

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election officers. When criminal offenses are charged to have been committed, he must take the papers as they are, and the responsibility for errors committed must be upon the parties who are by law required to prepare the returns.

An order will be entered allowing the demurrer.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, respondents, agt.
EDWARD SEELEY, appellant.

Abduction—Penal Code, section 283, subdivision 1—What constitutes the crime of abduction under this section—Counts in indictment—Irregularities of jury for which new trial will not be granted.

It is not necessary, to constitute the crime of abduction, as defined by subdivision 1 of section 283 of the Penal Code, that the accused should in any case use any force or practice any fraud or deception, and it is sufficient within the statute if the female is induced by his request, advice or persuasion to go from the place where the accused met and approached such female with the request and solicitation for her to accompany him, or meet him at some other place indicated by the accused, with the intent and purpose there to accomplish the act of her defilement.

The offense may be accomplished without an actual manual capture of the female, nor is it necessary that she should be taken against her will, nor is it necessary that the girl should be taken from her parents or other custodian of her person.

The action of a jury in getting books of the law and consulting them while engaged in their deliberations in regard to a verdict, although irregular, is not sufficient to warrant a new trial.

Where there are three counts in an indictment the omission of the jury to render a verdict upon the second and third counts is not such an irregularity as should lead to a new trial, for the omission to find one way or the other is equivalent to an acquittal on those counts, and a judgment as to them is a bar to further prosecution.

Fifth Department, General Term, March, 1885.

Before SMITH, P. J., BARKER, HAIGHT and BRADLEY, JJ.

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THE appellant was convicted at the Monroe oyer and terminer for having abducted Lena Smith, a girl under the age of sixteen years, for the purpose of having sexual intercourse with her.

In the first count in the indictment it is charged that the defendant unlawfully and feloniously did take Lena Smith, a female under sixteen years of age, for the purpose of having sexual intercourse with her. This count is framed under subdivision 1 of section 282 of the Penal Code, as amended in 1884. The second and third counts charge offenses as defined in subdivisions 2 and 3 of the same section. The jury rendered a verdict of guilty, as charged in the first count, and in their verdict did not find either way on the other counts. Lena Smith, the prosecutrix, lived with her parents in a house near the grounds or yards of the city hospital in the city of Rochester. The accused had charge of the yards, and was acquainted with her and occasionally met Lena on the street in front of her father's house. She testified in substance, that on the evening of the day mentioned in the indictment she was on the street in front of her home in company with another girl, Jennie Brooks, of the age of twelve years, with whom she was acquainted, when the defendant came to them and commenced a conversation, and proposed to her that she go with him into the hospital grounds, and she refused, and he then walked away. He soon returned to the same place and renewed the request, addressing himself to the prosecutrix, and asked her to go into the hospital yard and there have sexual intercourse with him, and offered to give her a dollar, which he said she could divide with her companion, Jennie Brooks.

The prosecutrix then consented, and the defendant directed the way and the gate through which she should pass into the grounds, and the girl Jennie Brooks accompanied her and he went by another way, passing through an alley, and they soon met in the grounds at the place designated by the defendant, a secluded part of the inclosure. While in the grounds the

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defendant had sexual intercourse with both girls. They then separated and the girls returned to the sidewalk, in front of Lena's home, where the accused soon joined them and he gave Lena fifty cents, which she shared with the girl Jennie. The prosecution called the latter as a witness and she fully corroborated the prosecutrix in her evidence, and the defendant's confessions were proved, which also tended to establish his guilt and confirm the story of the witnesses for the prosecution.

One of the points made by the appellant's counsel on the trial was that the evidence did not constitute an offense within the sense and meaning of the statute.

William Henry Davis, for appellant.

W. H. Shaffer, assistant district attorney, for respondent.

BARKER, J. — The statute creating and defining the offense of which the defendant was convicted, is terse in expression as well as plain in its provisions. It declares that "a person who takes a female under the age of sixteen years for the purpose of prostitution or sexual intercourse, or without the consent of her father, mother, guardian or other person having legal charge of her person, for the purpose of marriage, * * * is guilty of abduction and punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both."

The only serious question presented is as to what acts on the part of the accused person will constitute an unlawful and criminal taking within the sense and meaning of the statute. We think it clear; in view of the nature of the wrong which the statute intended to punish, that it is not necessary to constitute the crime that the accused should in any case use any force or practice any fraud or deception, and that it is sufficient within the statute if the female is induced by his request, advice or persuasion to go from the place where the accused met and approached the prosecutrix with the request and solicitation for her to accompany him or meet him at some

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other place indicated by the accused, with the intent and purpose there to accomplish the wicked act of her defilement.

The offense may be accomplished without an actual manual capture of the female, nor is it necessary that she should be taken against her will. The section, as originally adopted, required that the taking should be without the consent of the father, mother, guardian, or other person having legal charge of the prosecutrix. To constitute the offense, as the statute now reads, it is not necessary that the girl should be taken from her parents or other custodian of her person. *If the construction which we have placed upon the statute, is the correct one, then the evidence was sufficient to sustain the conviction and the defendant's guilt was established beyond much, if any, doubt.*

As the unlawful act mentioned in the statute constitutes the crime of abduction, we are aided in giving construction to the statute by the definition and meaning of the phrase abduction, as the same is used by jurists, law writers and lexicographers. Blackstone defines abduction to be the taking and carrying away of a child of a parent, or the wife of a husband, either by fraud, persuasion or open violence. (3 *Blacks. Com.*, 139, 140.)

When the word is used as a law phrase, Webster adopts and approves of this definition.

The English statute on the same subject (9 *Geo. IV.*, chap. 31, sec. 20), provides: "If any person shall unlawfully take or cause to be taken any unmarried female, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the legal charge of her person, shall be guilty of a misdemeanor." The English courts, in giving construction to this statute have frequently held that there need be no force, actual or constructive, and that slight enticement and persuasion, by which the female either accompanies or meets the abductor is sufficient (*Regina* agt. *Mankelton*, 6 *Cox Crim. Cases*, 143; *Regina* agt. *Timmins*, 8 *Cox Crim. Cases*, 401). In *Regina*

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agt. *Oliver* (10 *Cox Crim. Cases*, 403), the court said that if the prosecutrix acted under the advice and persuasion of the accused, it constituted an unlawful and criminal taking within the meaning of the statute.

Upon the trial of an indictment founded upon a section of the Revised Statutes, which enacts that every person who shall take any woman, unlawfully against her will, with intent to compel her by force, menace or duress to marry him, or to marry any other person, or to be defiled, it was held that it was not necessary for the prosecution to show that actual physical violence had been used by the prisoner, to constitute a taking of the prosecutrix against her will, within the meaning of the section, but that it was sufficient if she had been induced by deceit or false pretenses of the prisoner, to go to the place, and proof that she had been induced to go there on the pretense that she could find employment as a servant constituted a violation of the statute, and brought the case within the sense and meaning of the law and justified a conviction (*Beyer agt. The People*, 36 *N. Y.*, 369; *Schineker agt. The People*, 83 *N. Y.*, 194).

We have looked into the case of *Kaufman agt. The People* (11 *Hun*, 82), where the indictment was founded on chapter 105 of the Laws of 1848, and we are unable to find any point adjudicated contrary to the views which we have expressed. The charge of the court was fair and intelligent, clearly presenting for the consideration of the jury all the legal propositions involved, to which the defendant interposed no exceptions, and we are unable to discover any reason for reversing the judgment after considering the legal questions presented.

The motion for a new trial after the verdict was rendered, upon the ground that the jury were guilty of misbehavior was properly denied, and in reaching a conclusion on this question we follow the case of the *People agt. Draper* (28 *Hun*, 1), which is a decision of this court.

The omission of the jury to render a verdict upon the

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second and third counts is not such an irregularity as should lead to a new trial, for the omission to find one way or the other is equivalent to an acquittal on those counts, and a judgment as to them is a bar to a further prosecution (*People* agt. *Dowling*, 84 *N. Y.*, 478.)

As judgment has been pronounced upon the conviction, and there does not appear that there has been any stay in its execution, it is only necessary for us to order an affirmance.

Judgment and order affirmed.

All concur.

SURROGATE'S COURT.

In the Estate of CECILIA L. BOOTH, deceased.

Surrogate — Jurisdiction over will of resident of New Jersey leaving personal property in New York county — Sufficiency of execution should be tested by laws of New Jersey — What is a sufficient execution.

A paper purporting to be the will of a resident of New Jersey who died in that state leaving personal property in the county of New York, was propounded in that county for probate. Such paper was not subscribed by its maker, but her name appeared in her own handwriting in its opening sentence, which began: "If I, Cecilia L. Booth, should die," &c.

The instrument from first to last was written by the decedent while two persons were in attendance at her request for the purpose of attesting it. They duly subscribed their names as witnesses, and she acknowledged in their joint presence that the paper so authenticated was her will, at the same time displaying it so that they saw her name as written upon its face:

Held, first, that the surrogate of this county had jurisdiction in the premises.

Second. That the sufficiency of the execution of the disputed paper should be tested by the law of New Jersey, and not by that of New York.

Third. That the instrument was duly executed within the New Jersey statute of 1851, which required that a will should be "signed by the testator," and that such signature should be made by him, or the making thereof acknowledged by him in the presence of two witnesses.

New York county, June, 1885.

In the Estate of Cecilia L. Booth, deceased.

ROLLINS, S. — On the 10th of August, 1884, this decedent died at Long Branch, N. J., where she had resided for several years. A paper purporting to be her last will was propounded in this court on the 16th of August, 1884, and a petition was filed praying for its admission to probate. Objections were duly interposed and the issues thus raised were afterwards brought to a trial which is now concluded. The instrument in controversy is in words following:

"If I, Cecilia L. Booth, should die within the year 1884, I leave to my sister Geraldine Josephine Timoney, all the money due me from my late father's deceased will, also my wearing apparel and furniture, and I also leave to my little nephew Albert Philip Timoney, all money deposited in the Emigrant Savings Bank in my maiden name Cecilia L. Hatfield.

"Witnessed by Amelia Kurrus, Mamie Clifford, June 16, 1884."

It appears in evidence that the whole of this instrument, except the names of the two attesting witnesses, is in the handwriting of the decedent; that those names were written by Amelia Kurrus and Mamie Clifford respectively, at decedent's express request; and that while these two witnesses were together in her presence she declared the paper to be her will. Its admission to probate is resisted upon the following grounds:

First. It is claimed that as the decedent at the time of her death was domiciled in New Jersey, there executed the disputed paper and there died, the surrogate of this county has no jurisdiction to grant probate to such paper, in the first instance, and before it has been submitted to the proper judicial tribunal of decedent's domicile.

Whatever authority the surrogate has in the premises is derived from the Code of Civil Procedure. Section 2611 of that Code declares, among other things, that a will executed without the state of New York, and within the United States, in accordance with the laws of the place of its execution, may be proved in the state of New York.

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Section 2476 confers upon the surrogate's court of this county jurisdiction to take proof of the will of a non-resident testator who has died without the state, leaving personal property within such county. That the decedent, in the case at bar, left personal property in the county of New York is alleged in the petition, and is not denied. The respondent's contention as regards jurisdiction is therefore overruled (*See Russell agt. Hartt*, 87 N. Y., 19).

Second. It is insisted that the evidence fails to show the due execution of the paper which has occasioned the present controversy. The strength of this objection must be tested not by the laws of New York, but by the laws of New Jersey (*See Moultrie agt. Hunt*, 23 N. Y., 394; *Dupuy agt. Wurtz*, 53 N. Y., 556).

The act entitled "A supplement to the act entitled 'An act concerning wills,'" was passed by the New Jersey legislature in 1851 and has been in force ever since (*Nixon's Digest*, 1032). Its first section is as follows: "All wills and testaments * * * shall be in writing and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing be declared to be his last will in presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator."

The contestant insists that the paper here in controversy fails to conform to the requirements of the foregoing statute in two particulars:

First. Because it does not bear the "signature" of the alleged testatrix, and,

Second. Because the name of Cecilia L. Booth, which appears in the body of the instrument, and which is relied upon as the decedent's signature, is not satisfactorily shown to have been written by her in the presence of the two subscribing witnesses, or in their presence to have been acknowledged as her signature. The reports of judicial decisions in the State of New Jersey are silent with respect to the mean-

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ing of the words "signed" and "signature" in the statute of 1851, of the word "signed" in the statute of 1850, and of the same word in the statute of 1714. The last named act (1 *Laws of N. J.*, 7) provided that wills should be in writing and should be "signed" by the testator. When that act went into operation the statute of frauds (29 *Charles II*, chap. 3) was nearly forty years old. That statute had prescribed by its fifth section that all devises and bequests of lands should be "in writing and signed by the parties so devising the same," * * * and should be "attested and *subscribed* by three or four credible witnesses." As early as 1680 the court of king's bench decided that, within the meaning of section 5, the position of the testator's signature was immaterial (*Lemayne* agt. *Stanley*, 3 *Lev.*, 1). It was held by all the judges that the words, "I, John Stanley," written by John Stanley himself in the exordium of his will, constituted a valid signature "within the statute, which does not appoint where the will shall be signed, at the top, bottom or margin, and, therefore, a signing in any part is sufficient."

This decision has been adversely criticised by writers of legal treatises; but the interpretation which it fastened upon the statute of frauds was stoutly upheld in the English courts for more than a century and a-half, and, until the enactment of the statute of 1 *Victoria* (chap. 26), a subscription by the testator at the foot or end of his will was never deemed essential to its validity (see *Cook* agt. *Parsons*, *Finch's Prec. in Ch.*, 185; *Coles* agt. *Trecothick*, 9 *Ves.*, 249; *Morrison* agt. *Turnour*, 18 *Ves.*, 176; *Trott* agt. *Skidmore*, 6 *Jur. [N. S.]*, 760.)

The American courts have generally followed in the path of these decisions, though at times somewhat grudgingly. It was declared by the general court of Virginia, in 1815 (*Selden* agt. *Colter*, 2 *Va. Cas.*, 553), that in interpreting the statute of wills of that state (a statute which was admittedly borrowed from 29 *Charles II*, chap. 3), the doctrine of *Lemayne* agt. *Stanley* (*supra*) should be accepted as authoritative. PARKER, J., pronouncing the opinion of the court, said that

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the word "signed," as used in the Virginia Wills act, must be taken as having the legal sense that had been stamped upon it by the English courts, and declared it to be settled law that the insertion of a testator's name in the beginning of a holographic will constituted a sufficient signing. To similar effect see, also, *Matter of Sarah Miles* (4 Dana [Ky.], 1); *Adams* agt. *Fields* (21 Vt., 256); *Allen* agt. *Everitt* (12 B. Monroe, 371); *Armstrong* agt. *Armstrong* (29 Ala. [N. S.], 538).

These cases fully establish the proposition that where the testator's signature is made one of the essential features of the valid execution of a will, his name need not be subscribed at the foot or end of such will, but if written in any part of the instrument will constitute a sufficient signature, provided that such instrument is in the handwriting of the testator himself, and that by inserting his name he has designed to authenticate such instrument without further signature, and provided, also, that such insertion of his name has been made by the testator in the presence of the attesting witnesses, or has in their presence been duly acknowledged.

Several of the cases above cited go much further than this; few have fallen under my observation that do not go as far.

In *Catlett* agt. *Catlett* (35 Mo., 340), cited by the contestant, the so called will was not in the handwriting of the testator and was not put upon paper in his presence. Besides, the *testimonium* clause clearly indicated that the introduction of his name at the beginning of the instrument was not intended to take the place of a more formal signature. In *Waller* agt. *Waller* (1 Gratt., 454), also cited by contestant, the paper in dispute was holographic, but though it concluded with an unfilled attestation clause it bore the names of no witnesses. From these facts the court inferred that the instrument was deliberative merely, and that in its unfinished state its maker could never have intended it as a completed will.

Ramsey agt. *Ramsey* (13 Gratt., 664) and *Roy* agt. *Roy's*

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Ex'rs (16 *Gratt.*, 418), are decisions interpretative of the Virginia Wills act of 1849. That act required not only that a will should be *signed* by the testator, but that it should be signed "in such manner as to make it manifest that the name was intended as a signature." In view of the exactions of this statute, the courts held in the two cases just cited that the act of a testator in writing his name at the commencement of a holographic will was an equivocal act, and would not constitute a sufficient signing, unless the testator's intention to give it effect as a signature was somehow made apparent on the face of the paper. Whatever construction I might give to the words "signed," and "signature," in the New Jersey statute of 1851, if the question of their meaning were now *res integra*, the weight of authority fully sustains the proponent's claim that Mrs. Booth's insertion of her name in the opening sentence of the paper before me constituted, when taken in connection with the attendant circumstances, a valid and sufficient signing.

In *Hoyssradt agt. Kingman* (22 *N. Y.*, 372), DENIO, J., referring to the re-enactment in this state of the statute of frauds and to the decisions of the English courts interpreting that statute, declared that those decisions were "authority with us to the same extent as in the English courts."

In *Davis agt. Shields* (26 *N. Y.*, 352-358), our court of errors clearly recognized the technical distinction between the word "sign" and the word "subscribe." So also did our court of appeals in *James agt. Patten* (6 *N. Y.*, 9). So did the legislature of this state when, in 1830, the existing wills act was placed upon the statute book. The express direction in that act contained, that a testator's name must thenceforth be *subscribed* at the end of his will, was avowedly inserted to prevent the recurrence of the mischiefs that were supposed to have resulted from the loose interpretation of the word *sign* in the statute of frauds.

Similar restrictive provisions were enacted in Pennsylvania three years later, and by the British parliament in 1837. It

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was after these conspicuous events that the legislature of New Jersey addressed itself in 1851 to the modification of the statute of 1714, respecting the execution of wills. The word "signed" had then a precise technical meaning which had been firmly established by a long line of adjudications. Surely that much construed word would not have been made to do duty in the amended statute if the legislature had intended to prescribe more stringent rules than had theretofore existed respecting the place of a testator's signature.

Third. The evidence does not distinctly show that the witness Manie Clifford saw the name of Cecilia L. Booth written by the decedent; and it is possible that at the time it was written Miss Clifford was not in the same room with the decedent, but in the room adjoining. Under all the circumstances, however, the signature was probably made in her presence within the decisions of *Compton* agt. *Mitton* (7 *Halst.*, 70); *Mickle* agt. *Matlook* (17 *N. J. Law*, 88), and *Ludlow* agt. *Ludlow* (35 *N. J. Eq.*, 489). Besides, there can be no doubt that when Mrs. Booth was writing the will both the witnesses were at hand for the purpose of attesting it; and that when in their presence she declared it to be her will, she intentionally placed it before them so that her name stood revealed. This was a substantial acknowledgment of the signature (*Beckett* agt. *Howe*, 39 *L. J. R. [N. S.]*, *Prob. & M.*, 1; *In the Goods of Janaway*, 44 *L. J., P. & M.*, 6; *Ilott* agt. *George*, 3 *Curt.*, 172; *Keigwin* agt. *Keigwin*, 3 *Curt.*, 611; *In the Goods of Bosanquet*, 2 *Rob.*, 577; *Gwillam* agt. *Gwillam*, 3 *Sw. & Tr.*, 200; *Baskin* agt. *Baskin*, 36 *N. Y.*, 416).

Petition granted.

Spencer agt. Wait.

SUPREME COURT.

GORDON P. SPENCER agt. ELIZA WAIT.

Justice's court—Judgment—Effect of filing justice's transcript in county clerk's office—Code of Procedure, section 68—Code of Civil Procedure, section 3017.

The filing of a justice's transcript in the county clerk's office, makes the judgment of the justice a judgment of the county court for all purposes. The statute of limitations applicable to such a judgment, is the statute applicable to judgments rendered in courts of record.

Jefferson Circuit, June, 1883.

On the 15th day of November, 1867, one Henry G. P. Spencer recovered a judgment in justices' court of Jefferson county against Eliza Wait, defendant, for forty-four dollars and seventy-three cents damages and three dollars and fifty cents costs. On the second day of December thereof, a transcript of said judgment was duly filed in the Jefferson county clerk's office. On April 20, 1883, H. G. P. Spencer assigned to plaintiff said judgment. This action, which is on said judgment, was commenced April 23, 1883.

James A. Ward, for plaintiff.

Charles D. Wright, for defendant.

VANN, J. — Although the judgment sued upon in this action was rendered in a court not of record, it became the judgment of a court of record upon the filing of the transcript. In the language of the statute, "thenceforth the judgment is deemed a judgment of the county court of that county" (*Code of Civil Pro., sec. 3017*). For what purpose? If no particular purpose is specified it must be for every purpose. Is any purpose specified? No purpose is directly specified, and no limitation is made. Is the statute to be construed as impliedly specifying the purpose of enforce-

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ment? If the legislature had intended that the judgment should thenceforth be deemed the judgment of the county court for the purpose of enforcement only, would it not have said so?

The Revised Statutes formerly provided that a justice's judgment, docketed by a county clerk, should "be a lien on the real estate of the defendant within the county in the same manner and with the like effect as if such judgment had been in the court of common pleas" (2 R. S. [1st ed.], 248, sec. 128). The legislature thus intended to give a justice's judgment, upon being docketed with the county clerk, *the effect* of a judgment of the court of common pleas to the extent specified. By the Code of Procedure a change was made, as section 63 provided that upon filing the transcript "the judgment shall be a judgment of the county court." The legislature did not enact that it should have the effect of a judgment of the county court, but that it should be one. The Code of Civil Procedure provides the same in substance, by section 3017, which should be construed in the light of the previous legislation upon the same subject. If the judgment in question is deemed a judgment of the county court without any specified limitation, it is, by the force of the statute, a judgment of the county court for all purposes. As a certain act makes it a judgment of the county court, it is by that act that the judgment is given or rendered in that court. A judgment is rendered when it is completed or perfected in the manner pointed out by statute or the practice of the court. In this case it was perfected by filing the transcript and docketing the judgment. There was no judicial determination by the county court; and there is none when judgment is entered by default upon a verified complaint on account. In both cases the action of the clerk was purely ministerial; still judgment is rendered by virtue of the statute in each case.

There should be judgment for the plaintiff, with costs, and findings may be prepared accordingly.

Sayer agt. MacDonald.

CITY COURT OF NEW YORK.

WILLIAM M. SAYER, Jr., and another, agt. JOHN J.
MACDONALD.*Supplementary proceedings — Sufficiency of affidavit to obtain order for examination of judgment debtor — Code of Civil Procedure, section 2458.*

It is not necessary to state in the affidavit to obtain order for examination of a judgment debtor, in proceedings supplementary to execution, that the city court of New York is a court of record, that no previous application for an order to examine judgment debtor has been made in the action or that the judgment was rendered upon the judgment debtor's appearance or personal service of the summons upon him.

*General Term, July, 1885.**Before McADAM, C. J., NEHRBAS and HYATT, JJ.*

THIS was an appeal from an order denying a motion to vacate order for examination of judgment debtor in proceedings supplementary to execution, on the grounds that the affidavit on which said order was obtained did not state that the city court is a court of record, that no previous application for an order to examine judgment debtor had been made in the action, and that the judgment was rendered upon the judgment debtor's appearance or personal service of the summons upon him.

John L. Brower, for plaintiffs and respondents.*J. P. Michelbacher*, for defendant and appellant.

McADAM, C. J.—The affidavit proves a judgment recovered in the city court, and it was not necessary to allege that the city court is a court of record. The Code supplies proof of that fact. It was not necessary to allege that no previous application had been made for the order (*Shank* agt. *Conover*,

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56 *How. Pr.*, 437). The only other point made by the appellant is that the affidavit does not allege that the judgment was recovered upon the personal service of the summons on the defendant or on his appearance (*Code, sec. 2458*). The Code is silent as to how this fact is to be established when called in question, and the inference is that the judgment-roll, which proves itself, is the evidence to which resort must be had.

The judgment on which the plaintiffs found their supplementary proceedings was, as before remarked, recovered in the city court, which on inspection proves "that the summons was personally served on the defendant on the 12th of August, 1884, at 1556 Third avenue, in the city of New York." The judgment-roll on file proves the requirements of section 2458 (*supra*) in regard to personal service. The roll is referred to in the affidavit, and may be inspected to sustain the order. We are of the opinion, therefore, that the order appealed from should be affirmed, with costs.

NEHRBAS and HYATT, JJ., concurred.

N. Y. COMMON PLEAS.

AMERICAN INSULATOR COMPANY, plaintiff and appellant, agt.
THE BANKERS AND MERCHANTS' TELEGRAPH COMPANY,
defendant and respondent.

Answer — *What is sufficient verification by corporation — Code of Civil Procedure, sections 525, 526.*

A verification of a pleading made by the secretary of a domestic corporation in the usual form, as required by the Code, when a pleading is verified by the party, is a sufficient verification.

It is only agents or attorneys that are required, when verifying pleadings, to set forth the grounds of their belief as to all matters not stated upon their knowledge, and the reason why the verification is not made by

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the party. A corporation cannot take an oath, and the statute points out the way in which it must verify a pleading. Such verification is the verification of the corporation and a verification by the party.

General Term, June, 1885.

Before DALY, C. J., and ALLEN, J.

ALLEN, J. — This is an appeal from an order of the general term of the city court of New York, affirming an order of the special term of that court vacating a judgment in favor of the plaintiff as having been irregularly entered.

The defendant served its answer on the 12th of September, 1884, and on the 13th of September the plaintiff mailed to the defendant's attorney a notice, pursuant to section 528 of the Code of Civil Procedure, that it elected to treat the answer as a nullity. On the fifteenth of the same month the plaintiff returned the answer with the reasons for so doing indorsed thereon, viz.: "That the verification did not state why the same was not made by the party defendant."

"*Second.* That it did not state the ground of the belief of the person making such verification as to the matters not stated upon his knowledge."

The verification was made by the secretary of the defendant, which is a domestic corporation, and was in the usual form as required by the Code, where a pleading is verified by the party. The plaintiff thereupon entered judgment. The judgment was, on motion, set aside, and the plaintiff appealed to the general term of the city court, where the order vacating the judgment was affirmed.

The verification was sufficient. In *Glaubenskleer agt. Hamburg and American Steam Packet Company* (9 Abb. Pr., 104), the court says: "When a corporation is a party the verification of the pleadings may be made by any officer thereof; and the officer making the verification is not required to state the grounds of his belief. His verification is that of the party." This decision was made under the old

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Code. Whether the rule laid down in this case controls now can be ascertained by comparing the section of the Code in force at the time of this decision and the provisions of the Code of Civil Procedure as they now exist.

Section 525 of the Code of Civil Procedure is as follows: "The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them who is acquainted with the facts except as follows:

First. Where the party is a domestic corporation the verification must be made by an officer thereof.

Second. Where the people of the state are, or a public officer in their behalf is, a party, the verification may be made by any person acquainted with the facts.

Third. Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the state, the county where he has an office, and capable of making the affidavit; or, if there are two or more parties united in interest and pleading together, where neither of them acquainted with the facts is within the county and capable of making the affidavit; or where the action or defense is founded upon a written instrument for the payment of money only, which is in the possession of the agent or attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case the verification may be made by the agent or the attorney for the party."

The section of the Code in force when the case above referred to was decided is as follows: "When the pleading is verified by any other person than the party he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reason why it is not made by the party. When a corporation is a party the verification may be made by any officer thereof."

It will be seen that the second paragraph of section 526 of the present Code is the same in substance as the first para-

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graph of the section of the old Code above quoted, and that the last paragraph of the section of the old Code applies to all corporations and provides that the verification may be made by any officer thereof, while subdivision 1 of section 525 applies to domestic corporations and provides that the verification must be made by an officer thereof. The second paragraph of section 526 unquestionably refers to subdivision 3 of section 525. It is only agents or attorneys that are required when verifying pleadings to set forth the grounds of their belief as to all matters not stated upon their knowledge, and the reason why the verification is not made by the party. A corporation cannot take an oath, and the statute points out the way in which it must verify a pleading. Such verification is the verification of the corporation and a verification by the party.

I do not find that there has been any change in the law in reference to the verification of pleadings which affects the decision in *Glaubensklee* agt. *The Hamburg and American Steam Packet Company*. That case prescribes the rule correctly as the law now stands.

The verification being sufficient, it is not necessary to discuss the question of due diligence in returning the answer.

The order appealed from should be affirmed.

DALY, C. J., concurs.

Matter of the Nassau Cable Company.

SUPREME COURT.

In the Matter of the NASSAU CABLE COMPANY in the city of Brooklyn.

Railroads — Laws of 1884, chapter 252 — Commissioners to determine as to whether a street railroad ought to be constructed and operated — No necessity to confirm an adverse decision.

Where commissioners were appointed under chapter 252 of the Laws of 1884, by the general term of the supreme court on the application of a railroad company to determine on the use of certain streets, and they reported against the application and in favor of the property owners: *Held*, that as the report was adverse to the company there was no necessity for its confirmation by the court.

It is made a condition precedent to a right to construct such railroad for the company to either obtain the consent of the property owners or a favorable report of the commissioners, confirmed by the court. There is no occasion for action by the court, except to confirm a favorable report or to refuse confirmation.

The court has power to determine whether the commissioners have performed their duties under the statute, and should it appear that they had refused to hear the parties or take any evidence, or the report was such as to plainly show fraud or irregularity, the report may be sent back. But an erroneous ruling in excluding testimony, or, in admitting immaterial, or even incompetent or hearsay evidence is not sufficient to warrant sending a case back for future hearing.

Second Department, General Term, May, 1885.

THE general term appointed three commissioners on the application of the company to determine on the use of several streets in the city of Brooklyn for a cable street railroad. The commissioners reported against the application and in favor of the property owners, who defended. The company appealed from the commissioners' report.

James A. Nelson and Charles P. Shaw, for company, appellants.

B. D. Silliman, T. C. Cronin, Mr. Moore, D. Benedict, S. D. Morris, Mr. Fisher, Mr. Arnold, Mr. Lowell, Mr.

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Cogswell, Mr. Shiller, Mr. Chittenden and Mr. Osborne, for property owners, respondents.

PRATT, J. — This proceeding was instituted under chapter 252 of Laws of 1884. Section 5 of that act provides that a general term of the supreme court shall appoint commissioners, who, under section 4 of said act, shall determine whether such road ought to be constructed.

Section 6 thus provides: "The commissioners shall determine, after such public hearing of all parties interested, whether such railroad ought to be constructed and operated, and shall make a report thereon, together with the evidence taken, to said general term, and their determination that such road ought to be constructed and operated, confirmed by said court, shall be taken in lieu of the consent of the property owners before mentioned."

There seems to be no occasion for action by the court, except to confirm a favorable report or to refuse confirmation. It is made a condition precedent to a right to construct such railroad for the company to either obtain the consent of the property owners or a favorable report of commissioners confirmed by the court. It is plain, therefore, there is nothing before the court to be confirmed as the report is not favorable.

The next question relates to the power and propriety of sending the report back for future hearing or the appointment of other commissioners to rehear the matter; and this question depends in a large measure upon the nature and duties of the commission appointed by the court. If these commissioners constitute a judicial tribunal, bound to proceed according to technical rules in hearing the parties, then palpable errors in ruling upon questions of evidence or refusing to regard the weight of evidence would be just cause for setting aside the report and sending the matter back to the same or other commissioners. But if the statute was intended to provide for a tribunal like a town meeting or a legislative committee, not bound to regard rules of evidence strictly, then the objections here raised will not avail to petitioners.

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I think the latter view is the correct one. The commissioners can take into consideration all matters material to determine whether the road ought to be constructed as proposed. They may view the matter, and their eyes and judgment as men may testify and furnish grounds upon which to base their determination. But they must give all interested an opportunity to be heard, as provided in the statute, and conduct the proceedings in a regular and orderly manner.

Inasmuch as their report requires confirmation to give it validity, there is an implied power granted to the court to determine whether the commissioners have performed their duties under the statute. In case it should appear that commissioners had refused to hear the parties or take any evidence, or the report was such as to plainly show fraud or irregularity, to hold that it could not be sent back would deprive the petitioner of a statutory right. An erroneous ruling in excluding testimony, or in admitting immaterial or even incompetent or hearsay evidence, is not sufficient to warrant sending a case back for future hearing. All that the commissioners passed upon was the precise application as made, and all that need be said upon the subject is that they have failed to make a favorable report, and the same is not in any manner impeached for fraud or irregularity. The commission was required to pass upon the petition as a whole, and they have done so. Whether it was competent for the commission to decide upon each street separately we are not called upon now to decide, all that need be determined is that it has not done so; and that having failed in so doing is not error calling for any action by this court. We do not deem it necessary to advert to the assignment of various errors committed by the commissioners, or to discuss the conclusions of fact which it is claimed ought to have been found. All we decide is that in our view there is nothing before the court calling for any action as the report is not favorable, and no such fraud or irregularity is shown as to warrant sending the report back.

Motion denied, without costs to either party.

Hughen agt. Woodward.

CITY COURT OF NEW YORK:

SAMUEL HUGHEN, respondent, agt. EDWARD H. WOODWARD,
impleaded, appellant.

Corporations — Actions against trustee to recover corporate debts as penalty for failure to file annual reports — Such actions are strictly penal — Party as witness excused from testifying — Code of Civil Procedure, section 837.

Actions against trustee to recover corporate debts as a penalty for failure to file annual reports are "penalties," within the meaning of section 837 of the Code of Civil Procedure. In such actions a party defendant is privileged from answering any question concerning the facts alleged in the complaint and cannot be compelled to answer upon an examination before trial any question which would support the claim of the plaintiffs, either against himself or his co-defendants.

General Term, June, 1885.

Before HAWES, HYATT, and BROWNE, JJ.

THIS action was brought against this defendant impleaded with two others, as three trustees of a manufacturing corporation, to recover a debt of the corporation by reason of the failure of the trustees to file an annual report. An order was obtained, *ex parte*, to examine the defendant Edward H. Woodward before trial. Upon the examination he was asked as to who were the other trustees of the corporation. He declined to answer on the ground that he would thereby expose himself to a penalty. The referee before whom he was examined overruled the objection, and application being made by the plaintiff to the court at special term to compel him to answer, the motion was granted and an appeal was taken. Further facts appear in the opinion.

James B. Dill (Dill & Chandler), attorneys for the appellant, argued that under the common law a witness was excused from answering any question which might expose him to a penalty or forfeiture and the rule extending to every thing in the

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nature of a penalty or forfeiture (*Livingstone agt. Tompkins*, 4 *Johns. Ch. R.*, 415), and the privilege extended not only to the main fact, but also to any one of a series of facts which, united together, might prove a fact which would subject him to a penalty or forfeiture (*Henry agt. Salina Bank*, 1 *N. Y.*, 83). The Code has preserved this same rule (*Sec. 837*). This action is a penalty or forfeiture within the meaning of section 837 of the Code. It is a penalty, and all the privileges of a penal action are extended to the defendant (*Halstead agt. Dodge*, 68 *How. Pr. R.*, 170; *Vernon agt. Palmer*, 48 *N. Y. Supr. Ct. R.*, 231).

Section 383 of the Code of Civil Procedure in providing for the short statute of limitations, uses precisely the same language in describing actions for a penalty or forfeiture; and an action of this nature under this statute has been uniformly held to be a penalty within the meaning of section 383 of the Code (*Merchants' Bank agt. Bliss*, 35 *N. Y.*, 412). The witness is excused from answering any question which would tend to prove a trusteeship of the other defendants, because a judgment against them would render him liable to an action for contribution (*Chapter 510 of the Laws of 1875*).

Henry M. Brigham, for the respondent, argued that while the action was in the nature of a penalty, it was remedial as to the creditors and not strictly a penalty (*Jones agt. Barlow*, 62 *N. Y.*, 202). That this was not a penalty within the meaning of section 837 of the Code (*Geisenheimer agt. Dodge*, 68 *How. Pr. R.*, 264).

BROWNE, J. — The action is in its nature penal, being to charge the three defendants sued as trustees of a corporation, personally, with the debt of the corporation upon the ground of its failure to file its annual report. The complaint alleges that the three defendants were trustees of the corporation. The defendants answered separately, each interposing a different defense, the defendant Woodward being silent in his

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answer on the subject of his trusteeship, neither denying nor in terms admitting the allegation.

An order to examine him before trial was granted and the two questions asked, which are involved in this appeal, were : First. " Who were the other acting directors of the company at the beginning of the year 1882?" And the second : " Who were the acting directors, who continued to act during 1882, from the beginning of the year until the 1st day of July, 1883?" Both questions the witness declined to answer on the ground that the answer would expose him to a penalty. The court overruled his objections to answer and he appeals from such ruling. The learned justice bases his ruling on the ground that the witness had, by his answer interposed to the complaint, admitted his trusteeship and thus settled the question of exposing himself to a penalty ; and further, that by this admission he had waived his privilege.

My opinion is that the questions propounded to the witness were objectionable. The examination of his pleading will disclose that the witness did not, in terms, admit his trusteeship, his admission being inferred from his failure to deny the allegation in the complaint. His answer is silent on the subject ; but for the purpose of pleading and of the issues to be tried, his silence is to be taken as an admission that he was such trustee at the times alleged in the complaint ; and no doubt a like rule applies to his silence in respect to the plaintiff's allegation that the other defendants were also trustees, but this admission does not involve more than the first pleaded. To the facts pleaded in the complaint, upon which the answer is silent, the defendant will not be heard to deny. Hence, there is no necessity for interrogating him as to those facts, and beyond them he is protected.

I am convinced, however, that the questions he is asked to answer are more comprehensive than a mere inquiry as to whether the other named defendants were trustees, and the form of the questions suggests to me an attempt on the part of the plaintiff to discover if others than the parties named

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were trustees. To name other trustees or directors of the company, covering the period when the witness was trustee, would be to furnish the plaintiff with evidence upon which to base a prosecution against them for a penalty sued for, which, if recovered against the persons so disclosed by the witness, would render the latter liable to contribute as co-trustees towards the payment of any judgment recovered (*Chap. 510, Laws of 1875*). This might prove a link in the chain of facts resulting eventually in exposing the witness to contribute towards the payment of the penalty. Against this liability he is protected by law (*Code Civ. Pro., sec. 837; Henry agt. Salina Bank, 1 N. Y. R., 83*).

It may be said that, because defect of parties defendant has not been pleaded, the presumption arises that no other trustees are liable; but this is without force in face of the fact that this action is for a penalty and the defendant is not obliged to admit any liability, nor is he called upon to inform the plaintiff of such defect. In any event, we should not speculate in theories to sustain the defendant's position, it being sufficient that by express affirmative enactment this privilege is accorded to the witness.

When the court is satisfied that the question is within the exception, it is sufficient that the witness claims the benefit thereof, without inquiring in what manner he would be prejudiced by his answer.

Under all the circumstances, I think the witness should be sustained in his refusal to answer the question. The order appealed from should be reversed and an order entered sustaining the objections, with ten dollars costs and disbursements to appellant.

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SUPREME COURT.

WUNNENBERG agt. GERARTY.

Summons — Service by publication — What is sufficient service by publication under the Code of Civil Procedure, sections 438, 439.

Where there was furnished to the judge who made the order for the service of a summons by publication a verified complaint showing a sufficient cause of action against the defendants to be served, and positive proof by affidavit that they resided in Ireland, and that the attorneys for the plaintiff delivered copies of the summonses to B. with directions to serve them; proof by the affidavit of one of the attorneys for plaintiff that he was informed and believes that the summons could not, after due diligence, be served on the defendants, supplemented by the affidavit of B., who was charged with the duty of making the service; that he had served the summons on a number of the defendants, but that he had been unable, with due diligence, to make personal service on the three defendants named, and he also proved their non-residence:

Held, that the statutory requirements of the Code of Civil Procedure have been complied with, and that the affidavits are sufficient.

The statutes do not require extreme diligence or extraordinary exertion. They only require proper and suitable diligence, such as the circumstances of the case require.

Second Department, General Term, July, 1885.

Boardman & Boardman, for plaintiffs, appellants.

John F. Bulwinkle, for purchaser and respondent.

DYKMAN, J. — This is an action for the foreclosure of a mortgage. A sale of the property has been made under the judgment to George Malcolm, who refuses to complete his purchase. His refusal was based on the insufficiency of the affidavits on which was founded an order for the service of the summons by publication on certain defendants in the action. The specific objections to the affidavits is that they

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do not show that the plaintiff was unable, with due diligence, to make personal service of the summons.

A motion was made to compel the completion of the purchase, which was denied, and the case came to us on appeal from that order. The material portion of the affidavits on which the order for service by publication was made are as follows :

One of the attorneys for the plaintiff says in his affidavit, "that since the commencement of this action he has made and caused to be made inquiries as to the residence of the said defendants, and that he has examined documentary evidence as to their names, ages and residences;" * * * "that said defendants Elizabeth Boylan, Catharine Boylan and John Boylan are each non-residents of the state of New York, and that said defendants each reside at Ballybag, county Monaghan, Ireland ; that the said defendant Elizabeth Boylan is of full age, and that the defendants Catharine Boylan and John Boylan are each infants over the age of fourteen years. Deponent further says that, as he is informed and believes, the summons herein cannot, after due diligence, be served on said defendants or either of them, and that it is necessary to serve the summons on them by due publication thereof."

The persons named in this affidavit are the defendants who were served by publication.

There was also presented at the same time an affidavit of John E. Burke, who swears therein that "he was directed by the plaintiff's attorney to serve the summons herein on the defendants herein, and for that purpose received copies of said summons ; * * * that deponent has served said summons upon a number of the defendants herein ; * * * that the plaintiff has been unable, with due diligence, to make personal service of the summons herein on the defendants Elizabeth Boylan, Catharine Boylan and John Boylan, or either of them, and that deponent cannot, after due diligence, serve the same upon said defendants, or either of them.

"Deponent further says that said defendants Elizabeth

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Boylan, Catharine Boylan and John Boylan are non-residents of the state of New York, and that they each reside at Ballybag, county Monaghan, Ireland."

There was also a verified complaint showing a sufficient cause of action. The sufficiency of these affidavits must be tested by the requirements of the Code of Civil Procedure.

Section 438 provides that an order directing the service of a summons upon a defendant without the state, or by publication, may be made where the defendant to be served being a natural person is not a resident of the state.

Section 439 requires the order to be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section, and also where the application is made, as it was here, upon the ground that the defendant is not a resident of the state, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons.

Thus it appears that in the case of a non-resident defendant these sections require a verified complaint containing a cause of action against the defendant to be served, proof by affidavit of the non-residence, and the plaintiff has been or will be unable, with due diligence, to make personal service.

In the case before us there was furnished to the judge who made the order a verified complaint, as required, and positive proof by affidavit that all the defendants to be served by publication resided in Ireland.

In addition to that he had positive proof that the attorneys for the plaintiff delivered copies of the summons to John Burke, with directions to serve them, and thus he had proof of some exertion and diligence to make a personal service; also he had proof by the affidavit of one of the attorneys for the plaintiff, that he was informed and believed that the summons could not after due diligence be served on the defendants, and this was supplemented by the affidavit of Burke, who was charged with the duty of making the service, that he had served the

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summons on a number of the defendants, but that he had been unable with due diligence to make personal service on the three defendants named, and he also proved the non-residence of those defendants.

If these statutory provisions are to receive a practical construction, they have been satisfied in this case. They do not require extreme diligence or extraordinary exertion. They only require proper, suitable diligence such as the circumstances require and what was required in this case.

After it was ascertained that the defendants to be served resided in Ireland the strong natural presumption arose that they were there and could not be found in this state. Still the efforts to make personal service did not cease, and a competent person was charged with the duty of finding all the defendants and making personal service. He received the summons and commenced the performance of his duty and found a number of the persons to be served, but was unable after due diligence to find the three defendants named. Was not this reasonable diligence? Did the circumstances of the case require more? If so, what more? No diligence could result in personal service within the state, for the persons to be served were in Ireland. An effort was made to serve all the defendants personally within this state, and in view of the non-residence of the defendants in question, that attempt amounted to due diligence, and was all that could be required.

These defendants resided in Ireland, and while that fact did not dispense with the necessity for some effort to make personal service in this state, yet it does assist in the solution of the question of due diligence, and under all the circumstances of this case we conclude that the order of publication was founded on proof sufficient to sustain its validity.

We cannot overlook the fact that objection to this order of publication is technical, and that title to real estate depends upon the validity of this judgment, nor to that other important fact that ample and liberal provision is made by section 445 of the Code to open the judgment for defendants served

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by publication and permit them to defend even seven years after the filing of the judgment-roll.

Such are our conclusions, based on the peculiar features of this case, and although we have examined all the cases, we find ourselves antagonistic to no decision on the subject. The statutes in question have received practically the same construction in all the cases, although the orders have sometimes been held invalid by reason of the insufficiency of the proof on which they were founded.

In the case of *Kennedy* agt. *Life Insurance Company* (32 Hun, 35) no fact was stated in the affidavit from which it could even be inferred that an attempt had been made to serve the defendants personally within this state, and it was held to be insufficient.

In the case of *Carlton* agt. *Carlton* (85 N. Y., 33) the affidavit simply stated that "the defendant has not resided within the state of New York since March, 1877, and deponent is informed and believes that defendant is now a resident of San Francisco, California." There was no allegation in the affidavit that the summons had been placed for service or that any effort had been made to accomplish personal service within the state, and it was held insufficient.

So we are in conflict with no decision, and we believe our construction to be reasonable and the only one under which these statutes could be operated in actual practice.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to compel the purchaser to complete his purchase should be granted, with ten dollars costs.

Aken agt. Kellogg and others.

SUPREME COURT.

ALLETTA A. AKEN agt. SARAH A. KELLOGG and others.

Dower — When will provides for wife in lieu of dower action must be taken within one year — Alleged fraud cannot alter or change statute — Complaint — Demurrer.

Where provision by a will is made for a woman in lieu of dower, she is required by statute to make an election between the provision and the dower, and she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof. Alleged fraud cannot alter or change the statute. Fraud may relieve a person from an agreement, but it cannot extend the statute for bringing an action or making an election. If an actionable fraud has been perpetrated, damages by way of compensation may be awarded, but the court cannot relieve from a statute bar.

Where the complaint alleged fraud, there should also be an averment that the statement made to the plaintiff was for the interest or purpose of influencing her action, as the fraud is not a statement of a fact, but the expression of an opinion.

Where a wife has received a part of the income of the estate under the will, she is in no condition to repudiate the election which she made without restoring or offering to restore its fruits.

Ulster Special Term, May, 1885.

DEMURREE to complaint.

F. Laflin, for defendant and demurrer.

Ward & Cameron, for plaintiff and demurrer.

WESTBROOK, J. — The plaintiff, as the widow of Benjamin Aken, deceased, brings this action to recover dower in the real estate described in the complaint of which her husband died seized, and alleges the following facts:

By the will of Benjamin Aken, which is made a part of the complaint, the testator gives to his "beloved wife, Alletta A.

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Aken, one-third part of" his "personal property absolutely;" also the one-third part of his real estate to Asa B. Kellogg, his son-in-law and executor, in trust to pay over the rents, issue and profits thereof unto his said "beloved wife, Alletta A. Aken, during her natural life, and upon her death, to distribute said real estate between" his "daughter Sarah A. Kellogg, and the issue of" his "son, Theodore Aken, so that" his "said daughter, Sarah A. Kellogg, shall receive one-half thereof, and the issue of said Theodore A. Aken one-half thereof, share and share alike."

The testator by his will declares: "The provision above made for my said wife is made and is to be received by her in lieu of dower."

The will also gave to his daughter Sarah A. Kellogg, wife of the executor Asa B. Kellogg, another one-third part of all his "estate both real and personal wherever situate, absolutely and at all events; and also to his executor the remaining one-third of all his estate real and personal in trust, to pay over the rents, issues and profits thereof to his "son Theodore Aken during his natural life, and upon his death to distribute and divide said estate among his lawful issue then living, share and share alike."

The complaint avers that Asa B. Kellogg, the husband and agent of Sarah A. Kellogg, the defendant, "stated and represented to the plaintiff that it would be much more advantageous to this plaintiff to accept the provisions of said will than to claim her right of dower in the estate left by the said Benjamin Aken, and that such representations and statements were made to this plaintiff by the said Asa B. Kellogg in the presence of the defendant Sarah A. Kellogg, acting as her agent and for her benefit;" and that the executor has paid to the plaintiff, who has received the same, portions of the income of the estate of her deceased husband under the will.

It also charges that in consequence of the statements made to her by the executor, which both said executor Asa B. Kellogg and his wife Sarah, knew to be false, the plaintiff

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omitted to take any steps whatever to possess or recover her dower in any of the lands of which her husband died seized, and that in consequence of the insolvency of the estate of Benjamin Aken she will receive nothing under the will. Wherefore she asks that she may "be relieved from the penalty imposed by statute for not having, within one year after the death of her husband," rejected the provisions of the will made for her benefit in lieu of dower, and that she be now allowed to make her election under the will, to renounce the provisions therein made for her benefit, and to recover her dower in the premises.

To this complaint there is a demurrer upon the ground that such complaint shows no cause of action, and the question which it presents arises under the Revised Statutes (1 *ed.*, 693, *secs.* 12, 13 and 14), which provides that when provision is made for a woman in lieu of dower, and she is required by such statute to make an election between the provision and the dower (and this is such a case), "she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof."

It is proposed in this opinion to state briefly the reasons why the demurrer should be sustained, without any formal or elaborate argument:

First. The alleged fraud of Sarah A. Kellogg and her husband cannot alter or change the statute. Fraud may relieve a person from an agreement, but it cannot extend the statute time for bringing an action or to make an election one day. To recover her dower the plaintiff was bound to commence her action or proceeding within one year after the death of her husband and the court is powerless to extend the time. If an actionable fraud has been perpetrated, damages by way of compensation may be awarded, but the court cannot relieve from a statute bar.

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Second. Even though the court could enlarge the time to recover dower against the perpetrators of the alleged fraud — Sarah A. Kellogg and her husband — it could not do so against parties not implicated therein. The defendants Edna Aken and Mand C. Aken, grandchildren of the testator, are, according to his will, equally interested with the defendant Sarah A. Kellogg in the premises in which the dower is asked to be assigned. There is no allegation in the complaint that their interest has been assigned by Sarah A. Kellogg. It is true, it is averred, that said Sarah "claims the title to all of said lands and premises," but it is not charged that the interest of the grandchildren has been transferred to her; on the contrary, it is charged "that the defendants Edna Aken and Mand C. Aken have, or claim to have, some title or interest in said premises." As these parties are implicated in no fraud, the plaintiff cannot have the relief she asks because thereby as against confessedly innocent parties, the statute time for bringing an action is enlarged.

Third. There is no averment in the complaint that the statement made to the plaintiff was for the intent or purpose of influencing her action; and it was not the statement of a fact, but the expression of an opinion.

Fourth. The plaintiff has received a part of the income of the estate, under the will, and she is in no condition to repudiate the election which she made, without restoring or offering to restore its fruits.

For these reasons the demurrer must be sustained, with costs, the plaintiff to be allowed, on payment of costs, to serve an amended complaint.

In the Estate of Frederick Grote, deceased.

SURROGATE'S COURT.

In the Estate of FREDERICK GROTE, deceased.

Will — Opposing probate of will by legatee when not a forfeiture of a legacy — Code of Civil Procedure, section 2718 — When proceedings should be dismissed in accordance with this section.

During the pendency of proceedings for the probate of an alleged will, the contestant, who was one of the next of kin of the decedent and was named in the disputed paper as a legatee, applied for an order directing the payment of a sum of money to be charged against her legacy or her distributive share accordingly as the disputed paper might thereafter be granted or refused probate. Such paper contained a provision declaring that any legatee or devisee who should contest its validity should forfeit thereby the bequest or devise in his favor.

The respondents having filed an answer setting forth the foregoing facts and alleging that because of them the legality and validity of the petitioner's claim was doubtful.

Held, that under section 2718 of the Code of Civil Procedure the application must be dismissed.

New York county, June, 1885.

ROLLINS, S. — The daughter of this testator is opposing the probate of the paper propounded as his will. Pending the controversy she asks that out of the assets of the estate there be paid to her a sum of money, to be reckoned as part of her distributive share as next of kin, in case her contest shall prove successful, and in case it shall fail, to be reckoned as part of her legacy.

The proponents dispute the petitioner's claim, and set forth facts that, as they contend, make its validity and legality doubtful. It is insisted in their behalf that, under these circumstances, the surrogate should dismiss the proceeding in accordance with the express directions of section 2718 of the Code of Civil Procedure. The grounds upon which the proponents attack the contestant's right to take any benefit from her father's will are these :

The paper in controversy contains the following provision :

ARTICLE 34. "Should any legatee or devisee contest the

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validity hereof, or any of the provisions herein contained, then any bequest or disposition herein made in favor of any such contestant shall thereupon cease, and be immediately revoked, canceled and annulled, and all gifts, bequests, &c., herein given to any such contestant shall thereupon immediately become and form a part of the rest, residue and remainder of my estate, &c.

Now, if the provision just quoted is valid and effectual, the proponents are obviously correct in claiming that in case the paper of which it forms a part shall be established as the testator's will, the contestant will be discovered to have no interest whatever in the estate.

The force and effect of article 34 cannot, of course, be finally determined upon this application; but the matter must, nevertheless, be provisionally considered for the purpose of ascertaining whether the contestant's action in opposing probate has rendered "doubtful" her claims as legatee.

The validity of such a condition as burdens the dispositions of the paper before me has not, so far as I am advised, been passed upon by the court of appeals of this state or by any of our appellate tribunals.

In *Jackson agt. Westerfield* (61 How. Pr., 399), an action for the construction of a will, it was held by VAN VORST, J., that a clause in the disputed paper which imposed restraints upon proper inquiry into testamentary capacity and the legality and validity of dispositions of property should not be favored. The learned justice cited in support of that proposition several English cases, holding that such conditions were to be treated so far as regards bequests of personalty, and in cases where there was no gift over, as not obligatory but as *in terrorem* only, and he held that non-compliance with the conditions would not work a forfeiture where there was *probabilis causa litigandi*.

It has already appeared that in the present case there is an express direction that any forfeited bequest or devise shall go to the residuary legatees and devisees. Now, there are

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many decisions in the English courts which sustain the right of a testator to provide that for unsuccessful opposition to the probate of his will, one named as a beneficiary shall forfeit his devise or legacy, and this especially when the testator has provided for a gift over.

Aside from other and earlier cases that support this proposition may be cited *Cooke* agt. *Turner* (15 *M. & W.*, 127); *Stevenson* agt. *Abington* (11 *W. R.*, 935), and *Evanturel* agt. *Evanturel* (*L. R.*, 6 *P. C.*, 1).

The validity of such conditions as are here under discussion was maintained by the supreme court of Ohio in *Bradford* agt. *Bradford* (19 *Ohio State*, 546), and was denied by the supreme court of Pennsylvania in *Chew's Appeal* (45 *Penn. St.*, 228.)

It is unnecessary to pursue the subject further. I certainly should not feel justified, in the present state of the law, in holding that the question whether the contestant has forfeited all claim as legatee under the will is entirely free from doubt, and must therefore, in obedience to section 2718, as interpreted by the court of appeals in *Hurlburt* agt. *Durant* (88 *N. Y.*, 121), dismiss this petition, without prejudice to any claim that the contestant may hereafter make after the probate proceedings have terminated.

Siedenbach agt. Riley.

SUPREME COURT.

LOUIS SIEDENBACH, plaintiff and appellant, agt. JULIA A. RILEY, as administratrix, &c., of THOMAS M. RILEY, deceased, defendant and respondent.

Replevin — The issues capable of being tried in such an action.

Where a sheriff has attached goods under process against one Toledo, and the plaintiff claims title through the same person, it is entirely irrelevant who owns the goods if Toledo does not.

A denial of plaintiff's title alone is not a good defense.

If the bill of sale to plaintiff was *bona fide* and was followed by possession, plaintiff is entitled to recover.

These are questions for the jury.

A failure to give possession only raises a presumption of fraud which may be rebutted by proof that the transaction was fair.

No need of a demand if the complaint averred an unlawful detention.

Second Department, General Term, May, 1885.

Before BARNARD, P. J., and DYKMAN, J.

APPEAL from judgment dismissing the complaint and directing judgment against the plaintiff for \$7,440.

The action was brought to recover certain chattels, of which the plaintiff claims to be the owner, of the value of about \$7,500, and for damages for the detention thereof. The chattels consisted of 1,000 Remington rifles, etc.

The answer made by the intestate, who was the sheriff of the county of Kings, denied the wrongful detention, averred that the defendant had not any knowledge or information sufficient to form a belief that the goods, or any part of them, were the property of the plaintiff, and then proceeded to set forth that, as sheriff of Kings county, on the 29th day of December, 1879, he had seized the property under a warrant of attachment issued in an action in which De Witt C. Farrington was plaintiff and Roderigo Toledo was defendant, and that at that time the said property was either the property

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of said Toledo or that he had a leviabie interest therein. The answer did not deny the taking of said property; nor did it allege ownership in the republic of Honduras.

The plaintiff derived his title to the rifles, &c., by a bill of sale dated 21st July, 1879, from said Toledo, which it was claimed was followed by change of possession within a day or two thereafter, and at the time of the levy of the attachment the chattels were at the Brooklyn Navy Yard on storage, to the order and credit of plaintiff.

On the 29th day of December, 1879, some six months later, the attachment before referred to was levied on said chattels, the sheriff claiming they were the property of said Toledo, or that he had an attachable interest therein.

At the trial term, at the close of all the evidence on both sides, the court below dismissed the complaint and directed the jury to award judgment in favor of the defendant (the sheriff) for \$7,440, the value of said rifles.

The ground upon which the court directed a verdict dismissing the complaint, was that by the terms of the contract between "D. W. C. Farrington, treasurer of the Lowell Battery Gun Company and R. Toledo, esq., special commissioner for the republic of Honduras," the property in question was owned by said republic of Honduras, and denied leave to the plaintiff to go to the jury upon the question whether the title to the property was in Toledo at the time he sold it to plaintiff.

Charles Blandy, of counsel for appellant (*Richard S. Newcombe*, attorney).

Benjamin F. Butler, of counsel for respondent (*Morris & Pearsall*, attorneys).

BARNARD, P. J. — Both parties claim under the same title. The plaintiff claims under a bill of sale from one Toledo, and the defendant under an attachment against Toledo. It is entirely irrelevant who owns the goods under the pleadings

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if Toledo does not. The evidence at least presumptively showed a title in the plaintiff derived from Toledo and accompanied by possession. The defendant levied upon the property as property of Toledo, and there is no claim of title through any other party authorizing the creditor to attack Toledo's title (*Smith* agt. *Hall*, 67 *N. Y.*, 48). It was always a law in this state that a denial of plaintiff's title alone is not a good defense (*Eustice* agt. *Holmes*, 3 *Denio*, 244).

This conclusion leaves only questions of fact in the case. Was the bill of sale a genuine, real *bona fide* bill of sale? Was the possession given over of the goods? If these two questions are answered affirmatively, the plaintiff is entitled to recover for the plaintiff's bill of sale and the delivery if possession under it ante-date the levy. Both questions are for a jury (*Blount* agt. *Gobler*, 57 *N. Y.*, 451; *Juillard* agt. *Chaffee*, 92 *N. Y.*, 529; *Powell* agt. *Powell*, 71 *N. Y.*, 71).

If the change of possession was not absolute and immediate and continued, the good faith of the transaction may still be shown to the jury, for the failure to give possession only raises a presumption of fraud which may be rebutted by proof that the transaction was fair. In the evidence as taken the proof of change of possession is abundant. If the proof is to be credited all dominion over the property was delivered to the plaintiff and received by him. There was no need of an amendment of the complaint in respect to a demand. An averment in a complaint that the defendant unlawfully detains the plaintiff's property is made out by proof of a demand. It is never necessary to plead the evidence.

The judgment should be reversed, with costs to abide event, and a new trial granted.

DYKMAN, J., concurs; PRATT, J., not sitting.

Matter of the Attorney-General agt. Atlantic Mutual Life Insurance Co.

SUPREME COURT.

In the Matter of the ATTORNEY GENERAL agt. THE ATLANTIC
MUTUAL LIFE INSURANCE COMPANY. (Petition of WILLIAM
BARNES.)

Corporations — Receiver — When and how far corporations attacked by the state for insolvency may use their corporate funds after the appointment of a receiver.

Corporations attacked by the state for insolvency can, even after a receiver is appointed, use their corporate funds for their own protection in the litigation if their action is taken in good faith and with a reasonable hope of success in the controversy.

Third Department, General Term, June, 1885.

Before LEARNED, P. J., BOCKES and LANDON, JJ.

LANDON, J. — Reviewing the discretion exercised by the special term in allowing to the petitioner compensation for his services rendered for the company after the receiver of its property had been appointed, we conclude that a case was presented justifying an allowance within the opinion of the court of appeals in *Barnes agt. Newcomb* (89 N. Y., 108), rendered upon the claim in question.

First. The company appears to have been deprived of its property and business upon a contested allegation of insolvency. The property was great, and there were reasonable grounds for the company to hope that upon appeal the order depriving it of its property would be reversed.

Second. After the appointment of the receiver the statute (*chap. 902, sec. 8, Laws 1869*) required that a competent actuary should examine the condition of the company and report whether its assets were sufficient to enable it to meet its obligations matured and to mature. The liabilities of the company upon existing policies could, from the nature of the

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case, only be estimated. The actuary made his report. It was adverse to the company. But the principles upon which he made the estimate of maturing liabilities were at that time not well established. If a different basis had been adopted, the solvency of the company would have been shown, and thereupon it would have been competent for the court in its discretion to reinstate the company in its property and business. That the company should contest the accuracy of this report in the courts was a natural and reasonable step for it to take in its struggle for existence.

Third. Pending the litigation, the assets of the company so appreciated in value that they appeared to exceed its liabilities. Upon this ground the company applied to the court to be restored to its possession and be allowed to resume business. The effort was unsuccessful, mainly because it was felt by the court that a life insurance company, discredited by hostile litigation at the suit of the state, could not with safety to its policyholders be permitted to resume business (74 *N. Y.*, 177; 77 *id.*, 336).

Thus the company struggled under circumstances which gave some promise of success in every way open to it to recover its vast property and resume its business. Its entire good faith in making the struggle is found by the court below, a finding which seems unquestionable under the circumstances.

Order affirmed, with costs and disbursements.

BOCKES, *J.* — Under the order of reference the referee, after a full hearing, has, as he was authorized to do, certified to the court the value of the services in controversy and his opinion as to the amount the applicant should receive or be paid, and further, that the services and disbursements incurred in connection with them were rendered and made in good faith, and with the reasonable and well grounded belief that the proceedings would benefit the company, its stockholders and policyholders; and there is no question but that the proceedings were taken under the sanction of the officers of the

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corporation, with the belief and hope that the company should in justice be restored to its corporate rights. The special term has given sanction to these conclusions of the referee, and for myself I cannot well say, after looking into the proof, that an error has been committed in that regard. The case then is brought directly within the principle laid down in *Barnes* agt. *Newcomb* (85 N. Y., 108), to the effect that the trustees of a corporation whose existence is attacked, should be afforded the means of resistance as far as the facts justify, and that justice requires that an allowance should be made for such amount as would afford a reasonable compensation therefor. The steps necessary to the determination of these questions have here been taken, and the justice and reasonableness of the claims, as well to the items as to the aggregate, have been established. Nor am I able to say, under the rule laid down for our guidance by the court of appeals, that any one of the proceedings for which an allowance was made was unreasonable to an extent making it absolutely improper; nor can I well say under the proof that the amount certified as justly due for the services performed, or for any item of those services, is in excess of what should be allowed. I must concur in the opinion of my brother LONDON, and vote for an affirmance of the order directed by the special term.

LEARNED, P. J., not acting.

The Mayor agt. Heuft.

NEW YORK COMMON PLEAS.

The MAYOR agt. HEUFT.

New York (city of).—Common council no power to pass ordinance which in effect gives a person the right to maintain an incumbrance for any period less than ten days.

To an action brought for a violation of a corporation ordinance, the defense set up a resolution, passed by the common council on September 18, 1884, providing that the corporation attorney, before the commencement of any action for the violation of any of the ordinances of the city, shall give notice in writing ten days before instituting suit, to every delinquent.

Held, that the common council had no power to pass such ordinance.

General Term, July, 1885.

Before VAN HOESSEN and ALLEN, JJ.

PER CURIAM.—It is true that this ordinance does not deprive the department of public works of its power to remove encroachments, but it does attempt to take away the right to punish the person who creates the incumbrance, for it provides that no one shall be sued for placing an incumbrance on a street unless he persists in maintaining it for a certain period after he had notice to remove it. The ordinance in effect gives to any person the right to maintain an incumbrance for any period less than ten days, for it declares that unless he maintains it for ten days after having been notified to remove it he shall not be liable to an action. He may maintain an encroachment on the street for nine days, or nine days and a half, without being liable to any action whatever if this ordinance be valid. This cannot be. The common council is forbidden to permit any encroachment except the temporary occupation of such part of a street as may be adjacent to a lot on which a building is in course of construction. It is true that the ordinance does not expressly declare that encroachments are authorized, but it does forbid prosecution

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of those who are guilty of encroaching. It is a familiar saying that there can be no law without a sanction. Where a right exists there must be a way of protecting it, and of punishing those who violate it. When you take away the means of enforcing the right you destroy the very right itself. When the common council, therefore, ordained that a man might keep up an encroachment for any period less than ten days without being liable to an action, it virtually gave to all persons the liberty to encroach at their pleasure on the streets for less than ten days at a time.

It is argued that justice GEDNEY intended to decide that the defendant did not in fact ever encroach on the street, and there are parts of the record that give color to that argument; but other parts of the record seem to show that he meant to decide that the ordinance was valid.

We think it better, therefore, to reverse the judgment and to order a new trial, without costs.

SUPREME COURT

RICHARD R. BOWKER and others, as executors, &c., plaintiffs,
agt. DAVID A. WELLS and others, defendants.

Will — Construction of — Trust — When not raised on face of will — Moral obligation does not create a trust.

The courts recognize a difference between the intent of a testator to create a legal direction on his devisee and the intent solely to create a moral obligation; the latter does not create a trust.

While a secret trust to apply devised property to an illegal purpose will render the devisee a trustee for the heirs-at-law or next of kin, the trust must be established in such a manner that if legal it would be binding upon the trustee.

D. by her will gave the bulk of her estate to four persons, or such of them as might survive her and be of sound mind, absolutely, as joint tenants and not as tenants in common (expressing a wish although stating that it was not to be taken as a legal direction), the estate so bequeathed and

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devised should be applied by these four gentlemen as they might deem wise to the promotion in the United States of sound political knowledge.

In an action to construe the will:

Held, that the language of the will, if directed toward a purpose capable of legal enforcement, would not have created a trust, and as there is no promise shown *de hors* the will to apply the devised property to such purpose, the devise is valid and the devisees take the property absolutely as their own (*O'Hara agt. Dudley*, 93 *N. Y.*, 403, *distinguished*).

Kings Special Term, June, 1885.

ACTION by the executors of the will of Jane M. Dugdale for a construction of the fifth clause thereof.

The clause of the will under discussion was as follows:

"*Fifth*. All the remainder of my estate, real and personal, together with the rents, issues and profits thereof, I hereby give, bequeath and devise to David A. Wells, of Norwich, Conn., and Richard Rogers Bowker, Worthington O. Ford and Edward M. Shepard, of the city of Brooklyn, or such of them as may survive me, and at the time of my death shall be sound in mind, as joint tenants, and not as tenants in common, to have and to hold to them, their heirs, executors, administrators and assigns, forever. I direct, however, that until after the death of two of them no one of them shall have any power to maintain actual partition or any other proceeding to set off or separate any individual share; but this shall not prevent or affect any sale or other disposition of the said remainder of my estate, or any part thereof, by the said four gentlemen, or any suit or proceeding to procure such sale or disposition; nor shall such direction prevent the release and conveyance by any one of the said four gentlemen to any of the others of his interest and estate in the said remainder of my estate.

"This bequest and devise I make absolute in order that there may be no legal or technical difficulty or embarrassment in effecting the end I desire, and having entire confidence that those four gentlemen will, although under no legal obligation so to do, observe my wishes; and my wish is (although this is not to be taken as a legal direction) that my residuary

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estate so bequeathed and devised, and any proceeds thereof, shall, under the name of 'The Richard L. Dugdale Fund,' be applied as those four gentlemen, or such persons as they may associate with them, or a majority of them may deem wise, to the promotion in the United States of sound political knowledge and opinions. I should be especially glad if this fund could promote a work similar to that done by the Society for Political Education.

"This bequest and devise I make, first, because I have no near relations, my only relations being those residing abroad whom I have not known for many years, and because there are no persons having just claims on me for whom I have not properly provided; and, secondly, because I am greatly attached, as was my brother Richard (the memorial of some of whose work is found in the book called 'The Jukes'), to the work which I have desired the four gentlemen last named to conduct."

Nelson S. Spencer, for plaintiffs.

Samuel H. Ordway, for defendants' residuary legatees.

Coudert Brothers, for defendants Chanet and others, heirs and next of kin.

C. & C. E. Tracy, for defendants Cuddon, heirs and next of kin.

CULLEN, J. — This case differs from *O'Hara agt. Dudley* both in the form of the action and in its facts. This suit is brought to construe the will of the testatrix, and the validity of the provisions of that will must be determined on the face of the will. The action in *O'Hara agt. Dudley* was to declare a trust in favor of the heirs in consequence of the promise made by the devisees, and the action was decided in favor of the heirs solely on account of such promise. No promise is alleged or shown in this case. Nor can there be said to be a

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trust raised on the face of the will, for the testatrix declares that she intends to make the gift absolute, and that there should be no legal obligation upon the devisees to comply with her wishes as to the eventual disposition of the property. As she has said in the plainest terms there shall be no trust, the courts cannot say there is such a trust. Further, there is no illegality or contravention of public policy in affecting the object she sought to attain. In this respect also the case differs from that which the court of appeals interpreted as the intention of the testator in *O'Hara agt. Dudley*.

Miss Dugdale wished no accumulation of the fund; she suggested no restraint upon its absolute disposition for any period but two lives in being, and not necessarily for that time. In fact, if there were a trust it would be inoperative because the beneficiaries would be indefinite. But this the testatrix knew, and she did not intend to cast upon the courts the duty of seeing that her wishes were carried out, but left that solely to the sense of propriety her devisees might possess. If that sense of propriety does not dictate a disposition of the fund in accordance with the testatrix's wishes, that is exactly what the testatrix intended they should do in that contingency, though she hoped the contingency would not occur. In such case it cannot be said that any fraud is practiced on the testatrix, for the devisees never made any promise to her.

Without reviewing the decided cases at length, two principles seem established by them: First. The courts recognize the difference between the intent of a testator to create a legal direction on his devisee and the intent solely to create a moral obligation, and that the latter does not create a trust (1 *Jar. on Wills*, p. 385). Second. That while a secret trust to apply the devised property to an illegal purpose will render the devisee a trustee for the heirs at law or next of kin, the trust must be established in such manner that if legal it would have been binding upon the trustee (1 *Jar.*, p. 233).

As is my judgment the language of the will, if directed toward a purpose capable of legal enforcement, would not

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have created a trust, and as there is no promise shown *de hors* the will to apply the devised property to such purpose, it follows that the devise under discussion is valid, and that the devisees take the property absolutely as their own.

Costs of all parties to be paid out of the fund.

N. Y. COMMON PLEAS.

In re MARY BRASIER for leave to prosecute the official bond of CORNELIUS FARLEY, a city marshal.

Marshal's official bond — Liability of sureties — Judgment for costs on interlocutory order — Code of Civil Procedure, section 779.

The sureties on the official bond of a city marshal are not liable until after a valid judgment has been recovered against their principal.

A judgment entered on an interlocutory order awarding costs is not a valid judgment. Such costs are practically motion costs, and must be collected as such.

General Term, June, 1885.

E. P. Wilder, for appellant.

J. Geo. Flammer, for respondent.

ALLEN, J. — We are of the opinion that the order of the special term granting to the petitioner leave to prosecute the official bond of Cornelius Farley, one of the marshals of the city of New York, ought to be reversed, for the reason that the court below was without jurisdiction to enter the judgment for appellate costs, which forms the basis of the application for the order, and that the judgment, being unauthorized by law, is a nullity. We have no doubt that the sureties on the bond would be liable for all costs that accrued in the action, which resulted from the official misconduct of the marshal, whether they were costs of trial or costs of appeal, so long as

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such costs were incorporated in or formed a valid judgment within the jurisdiction of the court.

The act of 1882 (*Laws of 1882, p. 417, sec. 1701*) provides that only a person who shall have first obtained a judgment against the marshal for official misconduct may move for leave to prosecute his official bond. Of course, the judgment contemplated by this statute is a lawful and a valid judgment.

From the papers before the court it appears that action was commenced by the petitioner against the marshal to recover possession of personal property which had been taken from her by him while acting under an execution against one Ing. The action was tried and resulted in a verdict for the plaintiff, and a judgment was entered for the return of the property and for \$136.82 costs.

A motion to vacate this judgment for an alleged irregularity in the taxation of costs was made by the said marshal. The motion was denied, from which decision an appeal was taken to the general term of the city court, and from thence to the general term of this court, in both of which the order appealed from was affirmed, with costs; and upon the *remittitur* going down a judgment was entered in the city court in favor of the plaintiff, and against Farley, as marshal, for seventy-six dollars and ninety-six cents costs.

The original judgment for \$136.82 trial costs was paid and the property sued for restored to the petitioner. The application for leave to prosecute is founded upon the judgment of seventy-six dollars and ninety-six cents for costs of appeal from the order above referred to. We do not think there is any authority in law for the entry upon the *remittitur* of this court affirming the order of the city court of the judgment of seventy-six dollars and ninety-six cents for the costs of the appeal. An entry of judgment for costs upon an interlocutory order or upon an order of the general term affirming the order affecting a question of practice is nowhere authorized. A judgment cannot be perfected for costs of this character. The appeal here was in fact a continuation of the motion on

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appeal, and the costs of the successful party are motion costs within the meaning of section 779 of the Code of Procedure, and are to be collected as other motion costs are collected (*Phipps* agt. *Carman*, 26 *Hun*, 518; *Brown* agt. *Lugh*, 50 *N. Y.*, 427; *Wilkin* agt. *Raplee*, 52 *N. Y.*, 248). As this point was not raised upon the argument of this motion in the court below, no costs of this appeal are allowed.

SUPREME COURT.

JOSEPH W. PALMER agt. THE PENNSYLVANIA COMPANY.

Foreign corporation — Service of process on managing agent — Code of Civil Procedure, section 482, subdivision 3.

Defendant issued a freight receipt with the name of person served upon it as agent; receipt to be signed for agent not for company; receipt printed in blank with "Form 21, N. Y.," at head:

Held, that the Code does not specify agency, except person served must be managing agent. * * * Every object is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of service made. The statute is satisfied if he be managing agent to any extent.

Dutchess Special Term, November, 1884.

Grant B. Taylor, for plaintiff. (70 *N. Y.*, 227; 87 *N. Y.*, 137; 9 *How. Pr.*, 448; 2 *E. D. Smith*, 519; 57 *Barb.*, 438; 49 *How. Pr.*, 117; 1 *Keyes*, 347.)

R. F. Wilkinson, for defendant. (5 *How. Pr.*, 183; 6 *How. Pr.*, 308; 8 *Abb. Pr.*, 427; 13 *Hun*, 150; 17 *Hun*, 316.)

BARNARD, *J.* — The sole question on this motion is one of fact. Under subdivision 3 of section 482 of the Code service may be made upon a foreign corporation which has property within this state upon a "managing agent of the corporation within this state." The service of the summons was made

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upon Thomas C. Pollock. Pollock is employed by the Pennsylvania Railroad Company and paid by them, but he has the right to do something for the defendant. The moving affidavits leave it in doubt as to the precise extent of his powers. As a matter of convenience between the two companies he is authorized to transact certain details in connection with the business of the defendant. These details are not given beyond an expression in the moving affidavits, "such as the transmission of reports" to the defendant. The opposing affidavits show that the defendant has issued a form of freight receipt, "Form 21, N. Y.," which contains thereon a printed statement upon its side: "Thomas C. Pollock, agent. Office, New Pier 28, North River, New York." At the bottom there is printed the words, "Received payment for the Company.....for agent." Pollock used this form of receipt. In the absence of explanation this receipt imports enough to make out a managing agency.

The Code does not specify the extent of the agency beyond the fact that the person upon whom service is made shall be a managing agent. The defendant would be bound by Pollock's contracts for freight sent as well as by his receipts for freight received. I think this is enough to make the service good.

Motion denied, with ten dollars costs to abide event.

Second Department, General Term, February, 1885.

PRATT, J. — There is no doubt that defendants hold Pollock out to the world as their agent in the city of New York. It is plain that he has a large authority, and within a wide field his acts are binding on defendant.

The Code does not specify the extent of the agency required to bind defendants by service of process, except that the person upon whom the service is made must be managing agent. Were the rule to be established, as contended by appellants, that the agent must have charge of the whole business of the corporation the statute would be a dead letter, for such an

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agency seldom, if ever, exists. Every object of the service is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made. The statute is satisfied if he be a managing agent to any extent.

Order affirmed, with costs.

DYKMAN, J., concurs.

SURROGATE'S COURT.

In the Estate of ELLIS H. ELIAS, deceased.

Public administrator — Procedure of, to cause inquiry to be instituted as to the alleged withholding or concealment of property belonging to an intestate's estate — Code of Civil Procedure, sections 2706-2714.

First. It is by sections 2706-2714 of the Code of Civil Procedure, and not by section 223 of chapter 410 of the Laws of 1882, that the procedure is now regulated by which the public administrator can cause inquiry to be instituted into the alleged withholding or concealment of property belonging to an intestate's estate, whereof such public administrator is in charge by virtue of letters issued to him by the surrogate.

Second. The interposition of an answer such as is contemplated by section 2710 bars all inquiry concerning property to which the respondent by such answer properly claims title.

Third. But where the applicant alleges that the person cited has in his possession or control certain specified articles of property belonging to the decedent at the time of his death, and the respondent asserts his title to a portion of such property only, such an answer does not effectually bar all further inquiry.

Fourth. Whether an affidavit is an "answer" within the meaning of section 2710, *quære*.

New York county, July, 1885.

ROLLINS, S. — On the twelfth of May last the public administrator, to whom the surrogate lately granted letters as administrator of this estate, filed in this court the affidavit of William M. Elias, which alleged upon information and belief:

First. That this decedent at the time of his death, in June,

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1881, had in his possession or under his control United States government bonds of the value of about \$150,000, and,

Second. That at the time of the making of such affidavit such bonds were in the possession or under the control of decedent's widow, Maggie Elias.

The public administrator, upon filing this affidavit, applied for a citation directing the said Maggie Elias to appear before the surrogate at a time and place specified, and to "testify concerning the property of Ellis H. Elias, deceased." Such a citation was duly issued and served. On the day appointed for its return the respondent appeared by counsel, filed an affidavit, whose contents will presently be stated, and moved that the proceedings be dismissed. Shall this motion be granted?

The provision by which the public administrator of this county was formerly authorized to institute, in his official capacity, an inquiry concerning property of a decedent, not satisfactorily accounted for by persons who were about him in his last sickness, was section 8, title 6, chapter 6, part 2 of the Revised Statutes (3 *Banks' 6th ed.*, 128). This provision was re-enacted by section 222 of the consolidation act (*Laws of 1882, chap. 410*). By the act of April 22, 1870 (*chap. 359, Laws of 1870, sec. 7*), executors and administrators in general in the county of New York were granted substantially the same rights and privileges for the discovery of property concealed or withheld, as had theretofore been accorded to the public administrator. By chapter 394 of the Laws of 1870, the benefits of chapter 359 were extended to executors and administrators throughout the state. The statute law in this regard remained unchanged until the adoption of the Code of Civil Procedure, and in that Code its provisions were substantially re-enacted (*Secs. 2706-2714*).

It does not clearly appear whether the present proceeding is claimed to be instituted under the Code or under section 222 of chapter 410 of the Laws of 1882. It seems to me, however, that as the public administrator is in charge of this

In the Estate of Ellis H. Elias, deceased.

estate, not *virtute officii*, but by investiture of letters of administration issued to him by the surrogate, the course which he must here pursue for the discovery of property of his intestate's estate, claimed to be concealed or withheld, is fixed by the Code of Procedure (*Miller agt. Franklin Bank*, 1 *Paige*, 444).

The Code provisions upon this subject were amended by chapter 535 of the Laws of 1881, and the following words were added at the close of the 2710th section: "In case the person so cited shall interpose a written answer, duly verified, that he is the owner of *said property*, or is entitled to the possession *thereof* by virtue of any lien thereon, or special property therein, the surrogate shall dismiss the proceeding *as to such property so claimed.*"

In the case at bar the person cited has interposed an answer in words following:

"I am the widow of said Ellis H. Elias. During his lifetime he gave me from time to time United States bonds, and at the time of his death I had in my possession, as a part of said bonds so given to me, about \$30,000. I have no property of said Ellis H. Elias in my possession or under my control. I have property which I received from him. He gave it to me for myself, and I make claim to be the owner of all the property in my possession which I received from him."

Counsel for the moving party makes, as it seems to me, a just criticism upon the allegations of this affidavit. He insists that the respondent does not declare herself to be the owner of the "about \$150,000" whose whereabouts he is seeking to discover. So far as she asserts a claim to any sum whatever, parcel of such \$150,000, she maintains her ownership of no more than "about \$30,000." Her insistence of title to that sum is only a *pro tanto* bar to the petitioner's proposed inquiry. If she had absolutely denied her possession or control of any property whatever belonging to the decedent at the time of his death, it is very clear that such a denial would not have blocked her way to further investigation in this

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court. By the denial that she has in fact interposed, she has obstructed such investigation only so far as concerns the \$30,000 which she claims as hers.

I must hold, therefore, that, as regards her possession or control of any property held by this decedent at the time of his death, other than the sum of \$30,000 in United States bonds, this proceeding has not lost its vitality. The respondent is allowed one week within which to file, if she sees fit to do so, and if the facts will warrant it, an answer which will require the absolute dismissal of this proceeding.

I commend to the consideration of her counsel the petitioner's suggestion, that the paper by which it has been attempted to oust the surrogate of jurisdiction in this matter, is in the shape of an affidavit, and is not strictly an "answer," such as is contemplated by the Code.

In case the respondent shall again seek to avail herself of her privilege under section 2710, it may be well for her to assert it in more formal fashion.

SUPREME COURT.

JAMES B. STAATS agt. MARION E. WEMPLE.

Supplementary proceedings — When title to personal property vests in receiver appointed in — Code of Civil Procedure, sections 2467, 2468.

The title to the personal property of a judgment debtor, residing in another county than that in which the judgment-roll in the action is filed, is not vested in a receiver in supplementary proceedings until the order appointing him has been filed in the office of the clerk of the county where the judgment-roll is filed, and a copy of the order, certified by that clerk, is filed with the clerk of the county where the judgment debtor resides.

And until then the receiver is not entitled to an order requiring the judgment debtor to deliver his personal property to him.

Kings Special Term, May, 1885.

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THIS was a motion to compel the defendant, judgment debtor, to deliver certain personal property to a receiver appointed in supplementary proceedings, based upon the judgment rendered in the action against the defendant, who resided in Kings county. The action was brought in the supreme court for and the judgment-roll filed and judgment docketed in Albany county. A transcript was filed and judgment thereon docketed in Kings county. An execution was issued to and returned unsatisfied by the sheriff of that county. An order in supplementary proceedings was granted in Kings county, by one of the justices of the supreme court, referring the examination and returnable before him in that county. An examination was had and return made. Upon the return an order was granted at a special term held in Kings county, appointing a receiver of the property of the defendant. The motion papers did not disclose whether the order appointing the receiver had been filed in the office of the clerk of Albany county, and a copy certified by the clerk of that county filed in the office of the clerk of Kings county.

Horace G. Lansing, for the motion.

Rollin Tracy, opposed. The receiver has not become vested with any title in this personal property, and, therefore, is not entitled to an order requiring its delivery to him (*See Code Civ. Pro., secs. 2467, 2468, sub. 2*). The statute must be strictly followed, and nothing will be presumed to have been done (*Dubois agt. Cassidy, 75 N. Y., 298*).

CULLEN, J. — I think that under sections 2467 and 2468 of the Code of Civil Procedure, the order appointing the receiver must be filed in Albany county and a certified copy filed in Kings county, before the receiver obtains title.

Motion to compel defendant to deliver the personal property to the receiver denied, with ten dollars costs.

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Westover agt. The Ætna Life Insurance Company.

SUPREME COURT.

ROBERT R. WESTOVER as executor of HIRAM GOVE, deceased,
respondent, agt. THE ÆTNA LIFE INSURANCE COMPANY
appellant.

Insurance (Life)—Construction of question as to insanity—Code of Civil Procedure, section 834—Physicians not to disclose professional information—Right of executors to waive provisions of statute—Evidence—Insanity.

In an action upon a policy of life insurance where the contract was based upon a written application made by the insured and presented to the company in which the applicant made representations as to the state of his health at that time and previous thereto. In reply to an interrogatory, the insured stated that he had never been insane. Another question in the application was: "Have they, (parents, brothers or sisters) died of, or been afflicted with insanity, epilepsy * * * or other hereditary disease?" to which he answered no. The policy contained an express condition and agreement that all the answers, statements and representations should constitute a part of the contract and were warranted by the insured to be true in all respects, and if they were not, then the contract to be absolutely null and void. One of the defenses interposed by the company was that a sister of the insured was, and had been at the time the application was made and the policy issued, insane, and evidence was given to prove the truth of the answer.

Held, that if it was a fact that the sister was, or had been, at time of the application insane, and the same was of a temporary character only produced by physical causes at that time existing, it would not constitute a breach of any condition of the policy and thereby render it void. That to bring the case within the limits of the contract in this respect, so as to constitute a defense and defeat a recovery, it must be made to appear that the insanity which afflicted the sister of the insured, was constitutional and hereditary in its nature and character.

The contract of insurance contained a condition that if the insured should commit suicide or die by his own hand the policy should become void. The defendant proved and the plaintiff conceded that the insured did die by his own hand. The plaintiff sought to prove that the insured was insane at the time, and that in a legal sense he did not commit suicide or die by his own hands, and called the physician who attended the deceased during all the period of his mental disturbance, on this question. Defendant objected to this evidence on the ground that he was not competent by reason of the prohibition contained in section 834 of the Code of Civil Procedure:

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Held, that as the evidence was produced for the purpose of protecting the estate of the deceased, and to uphold a contract made by him in his lifetime with the defendant, he executors, as his personal representatives, possessed the right and privilege of releasing the physician from the statutory obligation of secrecy, and defendant had no ground for an exception.

After the plaintiff had introduced all his evidence on the question of the insanity of the deceased, and had rested his case for the second time, the defendant offered evidence to show the nature of the insanity of the deceased, and that the insanity with which he was afflicted was hereditary in its character. The offer was rejected upon the ground that the defendant's case had been rested, and that it had not been pleaded:

Held (BARKER, J.), that the first reason for rejecting the evidence was not well founded for the reason that prior to the time of this offer it would not have been pertinent for the defendant to give any evidence on the subject of the insanity of the insured, as no question had then been made as to such insanity. The plaintiff raised that question and gave evidence tending to prove the insanity of the insured at the time he took his own life, with a view of avoiding the legal effect of the act, and the defendant sought to meet this position of plaintiff and to show the nature and degree of the insanity, and this made the evidence offered material and competent (SMITH, P. J., and HARDIN, J., *dissenting*).

Held, further (BARKER, J.), that the other ground was equally without foundation, as it is set forth in the answer that it was a condition of the contract, in case the insured should commit suicide or die by his own hand, the policy of insurance should become null and void, and it is also alleged he did commit suicide and did die by his own hand.

Fourth Department, General Term, October, 1883.

Before JAMES C. SMITH, P. J., HARDIN and BARKER, JJ.

APPEAL from an order denying a new trial, founded on the judge's minutes. Since then a case has been made containing the evidence produced on the trial.

The action is founded on a policy of insurance issued upon the life of the deceased, the plaintiffs being the executors of his last will and testament.

The verdict was in the plaintiff's favor for the sum of \$4,188.

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Rollin Tracy, for appellant.

S. E. Payne, for respondent.

BARKER, J. — The contract of insurance was based upon a written application made by the insured and presented to the company, in which the applicant made representations as to the state of his health at that time and previous thereto. Such statements and representations were made by way of answer to written questions propounded on behalf of the company. In reply to an interrogatory the insured stated that he had never been insane. This answer was followed by an inquiry put in this form: "Has either of the parents, brothers, sisters or other near relations of the party been afflicted with rheumatism, insanity or with pulmonary, scrofulous or any other constitutional disease hereditary in its character?" This question was answered in the negative. The policy contained an express condition and agreement that all the answers, statements and representations should constitute a part of the contract, and were warranted by the insured to be true in all respects, and if they were not then the contract to be absolutely null and void.

One of the defenses interposed by the company is that Mrs. Branch, a sister of the insured, was, or had been at the time the application was made and the policy issued, insane, and on the trial gave evidence tending to prove the truth of the answer in this respect.

In the charge as given to the jury they were instructed in substance that if they found as a fact that Mrs. Branch was or had been at time of the application insane, and the same was of a temporary character only produced by physical causes at that time existing, it would not constitute a breach of any condition of the policy and thereby render it void; that to bring the case within the limits of the contract in this respect so as to constitute a defense and defeat a recovery, it must be made to appear that the insanity which afflicted

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the sister of the insured was constitutional and hereditary in its nature and character.

In *Peasley agt. Safety Deposit Life Insurance Company* (15 *Hun*, 227) this court held, in a case in every respect similar to this question, that such was the true construction to be placed upon the question and answer. A similar interpretation was given to a like question and answer (*Newton agt. The Mutual Benefit Life Insurance Company*, reported in the same volume, p. 595). The defendant proved, and it was conceded by the plaintiff to be true, that the insured did die by his own hand by the act of hanging himself by the neck. The contract of insurance contained a condition that if the insured should commit suicide or die by his own hand the policy should become null and void.

The plaintiff, with a view of meeting and avoiding the legal effect of this undisputed fact, sought to prove that the deceased did not voluntarily take his own life; that by reason of insanity he did not have sufficient mental capacity to understand the physical nature and consequences of his act, and that he was impelled to the act by insanity, and in a legal sense he did not commit suicide or die by his own hands.

Among the witnesses called by the plaintiff on this question was the physician who attended the deceased during all the period of his alleged mental disturbance. The defendant objected to the evidence of this witness on the ground that he was not competent, by reason of the prohibition contained in section 834 of the Code, and the same was overruled and an exception was taken. The physician testified as to the physical and mental condition of the deceased, as he ascertained the same during his frequent professional visits, by conversations had with and communications made to him by the deceased, upon which the witness based and expressed the opinion that the deceased was laboring under mental delusion and was in fact insane.

As the evidence was produced for the purpose of protecting the estate of the deceased, and to uphold a contract made by

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him in his lifetime with the defendant, the executors, as his personal representatives, possessed the right and privilege of releasing the physician from the statutory obligation of secrecy, and the defendant has no good ground for an exception.

In *Staunton agt. Parker* (19 *Hun*, 59) it was held that where the patient was dead the provisions of the statute could be waived by his representatives. The question there presented came upon a contest over the probate of the will of the deceased, and it was determined by the court, the heirs-at-law being the persons who succeeded to the real estate of the testator, they in their own behalf were competent to release the physician from all obligation imposed by the statute, and a mere stranger to the estate could not interpose the provisions of the statute as an objection to his competency.

In *Eddington agt. Mutual Life Insurance Company* (67 *N. Y.*, 196), in discussing the statute, the court remarked that the seal which the law fixes upon such communications remains unless removed by the party himself or his legal representatives (*See Parish Will Case*, 25 *N. Y.*, 9; *Wharton on Evidence*, sec. 591; 1 *Greenleaf*, sec. 243).

After the plaintiff had introduced all his evidence on the question of the insanity of the deceased, and had rested his case for the second time, the defendant called a witness to the stand who stated that he knew the decedent for many years, and was acquainted with his father and mother, and had an acquaintance with four of the uncles of the deceased on his mother's side and gave their names. He was then asked the following question: "Did you know of any peculiarity in either of these men?" The plaintiff's counsel then interposed an objection, without stating the grounds on which the same was based. The defendant's counsel then stated to the court that he offered the evidence as bearing upon the nature of the insanity of Hiram Gove, whose life was insured, and to show that the insanity with which he was afflicted was hereditary in its character. The case states that the offer was rejected,

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upon the ground that the defendant's case had been rested and that it had not been pleaded. To this ruling an exception was taken by the defendant.

The first reason assigned for rejecting the evidence is not well founded, for the reason prior to the time of this offer it would not have been pertinent for the defendant to give any evidence on the subject of the insanity of the insured. When the defendant first rested the case no question had been made as to the insanity of the deceased. The plaintiff raised that question and gave evidence tending to prove the insanity of the insured at the time he took his own life, with a view of avoiding the legal effect of the act, and the defendant sought to meet the position contended for by the plaintiff and to show the nature and degree of the insanity which afflicted the deceased. This made the evidence offered material and competent. The question was quite unimportant standing alone, yet as a preliminary inquiry it was proper and pertinent, and if the defendant had been allowed to proceed we may assume the examination would have disclosed facts bearing on the issue favorable to the defendant. The question was not objected to because it was in any respect improper or immaterial, or the witness was not qualified to testify on the subject, but the same was excluded for the reason the defendant was in no position to claim as a right, at that stage of the trial, the production of competent evidence on the question of the insanity of deceased.

As to the other grounds stated it seems to be equally without foundation, for it is set forth in the second paragraph of the answer that it was a condition of the contract, in case the insured should commit suicide or die by his own hand, the policy of insurance should become null and void, and it is also alleged he did commit suicide and did die by his own hand.

The exclusion of the evidence was plainly erroneous and manifestly detrimental to the defendant, as it excluded material evidence upon the vital question in dispute. For this error a new trial should be granted.

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SMITH, P. J. — I think the case was well tried. As to the ruling which my brother BARKER considers erroneous, I am of the opinion that the only line of proof which was open to the defendant at the stage of the trial when that ruling was made, was to disprove the alleged insanity of the deceased. The testimony offered and excluded did not tend in that direction, but on the contrary the offer assumed the fact of the alleged insanity and related to the character of it only.

In this judge HARDIN concurs.

The judgment and order affirmed with costs.

CITY COURT OF NEW YORK.

DAVID KIPP agt. J. H. RAPP *et al.*

Code of Civil Procedure, sections 66-449 — Attorney's lien — How enforced — When action on undertaking on appeal cannot be brought by attorney in his client's name.

The lien of an attorney attaches to the cause of action; but if the client has no cause of action at the time of suit brought, there is nothing to which the lien attaches unless it be the papers in the case.

If a judgment be recovered wholly for costs, it belongs to the attorney, who is regarded as the equitable assignee thereof, and he may prosecute in his own name the undertaking given to secure its payment.

When the plaintiff in an action, after recovering judgment therein, assigned his cause of action, &c., to one "P.," and the action was thereafter continued in the name of the original plaintiff, and a judgment for costs in his favor recovered in the court of appeals, which he also assigned to said "P.," and thereafter an action was brought in the name and with the consent of the original plaintiff by his attorney, who was the attorney of record for the respondent on said appeal, to recover from the sureties on appeal the amount of said judgment:

Held, that the action could not be maintained; that the attorney, being the equitable owner of the judgment, should have brought the action in his own name.

In such a case, the fact that the attorney obtained an order, after issue joined, permitting him to prosecute the action for the enforcement of his lien, did not alter the legal *status* of the parties to the action, or vest in the plaintiff a cause of action.

Trial Term, June, 1885

Kipp agt. Rapp *et al.*

ACTION to recover on an undertaking on appeal to the court of appeals. The trial of this action was commenced before chief justice McADAM and a jury. After the evidence was all in, there being no disputed questions of fact, the jury was discharged and the case submitted to the court upon the questions of law involved. The facts are sufficiently stated in the opinion.

Nelson Zabriskie, for plaintiff.

H. B. Kinghorn, for defendant.

McADAM, C. J.—The plaintiff commenced an action in this court against one David W. McLean, May 12, 1880. After two trials the plaintiff obtained a judgment in October, 1881, which was affirmed by the general term of this court in March, 1882; by the common pleas in June, 1882, and by the court of appeals in January, 1885. The right of action was transferred to Peter Smith Parker by assignment, dated December 3, 1881, but the action was continued in the name of the original plaintiff until its conclusion in January, 1885. The costs of affirmance in the court of appeals amount to \$127.14, and judgment was entered therefor January 24, 1885. The present action is brought to recover the amount of this judgment from the defendants, who were the sureties on the appeal to the court of appeals. The sureties plead by way of defense the transfer to Parker, and a release from him to them prior to the commencement of the present action, and also plead an assignment of the judgment in the court of appeals, executed by the plaintiff to said Parker.

The assignments above referred to were produced upon the trial, and their production in evidence established the fact that Kipp, the plaintiff, had no cause of action at the time the present suit was commenced.

The plaintiff's attorney obtained an order after issue joined permitting him to prosecute the action for the enforcement of his lien, but this circumstance does not alter the legal

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status of the parties to this action, and does not vest in the plaintiff a cause of action, if he had none at the time suit was commenced. The lien of the attorney attaches to the cause of action (*Code, sec. 66*); but if it be made to appear upon the trial that the plaintiff had no cause of action at the time he commenced his suit, there is nothing to which the lien can attach. The plaintiff's attorney has misconceived the practice. The judgment being for costs only, the attorney is to be regarded as the equitable assignee thereof, and the record is in itself legal notice of the lien, which cannot be discharged by payment to any one but the attorney (*Marshall agt. Meech, 51 N. Y., 143; Martin agt. Hawks, 15 Johns., 405; Wilkins agt. Batterman, 4 Barb., 47; Wells on Attorneys, sec. 379, and cases cited*). The attorney, in other words, became by force of law the owner of the judgment, entitled not only to enforce it, but every security given to insure its payment. Such being the legal effect of the judgment, the plaintiff's attorney should have brought the present action in his own name, as equitable owner of the judgment. If the transfer or release had been given after suit brought, a different question would have been presented — Kipp would have had a good cause of action at the time of suit brought, and the attorney's lien upon the cause of action would have been protected from any subsequent acts of the parties in fraud of it. For the purpose of protecting such a lien, *i. e.*, on the cause of action, an order permitting the attorney to prosecute the action for its enforcement would have been proper, and upon establishing a cause of action at the time suit was brought the judgment recovered might have been enforced to the extent of the lien established. But the trouble in the present case is that the plaintiff had no cause of action whatever when the suit was brought, and consequently there is nothing to which the lien of the attorney can attach, except perhaps the papers in the case, which the attorney is authorized to retain until his claim is satisfied (*Wells on Attorneys, sec. 373*).

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The attorney in this case did not need any equitable aid in asserting his lien; he did not require the use of his client's name as a party plaintiff; he was the equitable owner of the judgment and the real party in interest at the time the action was commenced, and it should have been prosecuted in his name as plaintiff (*Code, sec. 449*). In such an action the transfers by his client might have been held inoperative, as they could not defeat a recovery by the attorney. But as the person in whose name the action was commenced had no interest whatever in the cause of action at the time suit was brought, the action so commenced cannot be maintained. In fact, it is only on the theory that the plaintiff had no interest in the cause of action at the time suit was commenced that the attorney can avoid the effect of the transfers made by his client; for, if he had any interest therein, it passed to Parker by virtue of the assignments before referred to, and has been fully discharged by him.

The plaintiff's attorney cites *Martin agt. Hawks* (15 *Johns.*, 405) and *Wilkins agt. Batterman* (4 *Barb.*, 47), holding that an attorney, as equitable assignee, may maintain an action in the name of his client for the enforcement of the attorney's lien. But these decisions were made before the Code and at a time when choses in action were not assignable at law, so as to entitle the assignee to sue in his own name, and when he was on that account permitted to sue in the name of the assignor. The Code changed this rule by directing that every action shall be prosecuted in the name of the real party in interest, whether he be a legal or equitable assignee of the cause of action (*Code, sec. 449*; *Barbour on Parties*, 42, 43).

In *Shackleton agt. Hart* (20 *How. Pr.*, 39), the action was brought in the client's name to enforce the attorney's lien, but in the language of the report, it was commenced "avowedly to collect for the attorney's own benefit." There is no such avowal in the plaintiff's complaint, nor do I think such an avowal would have aided him. The Code has left the attorney free to prosecute in his own name all actions in which his

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rights as legal or equitable assignee have been injured or require legal redress.

In *Pickard agt. Yencer* (10 *Weekly Dig.*, 271), like the cases in 10 *Abb. N. C.*, 393, the settlements designed to defeat the attorney's lien were made after suit brought, and the attorney was allowed to continue the action for the enforcement of his lien, but the principles decided there have, for the reasons before stated, no application here. It follows that the complaint must be dismissed, with costs.

In the Matter of the Application of JOHN F. BRIDGMAN agt.
BENJAMIN H. HALL.

Office and officer — Books and papers — When application (under art. 5, title 6, chap. 15, part 1, R. S.) by an officer to compel the delivery of books and papers should be denied.

It is only in a clear case, or in one free from reasonable doubt, that the authority conferred upon the court by the Revised Statutes to compel the delivery of books and papers in the possession of one officer to the custody of another will be exercised. The remedy is only given where the case is so clear that the conduct of the party, in refusing to deliver, could be called *willful* or *obstinate*, and not in a case in which a person in *good faith* holds possession of an office supposing himself to be its lawful incumbent, and with that possession the custody of books and papers essential to the proper discharge of its duties.

Do the provisions of the Revised Statutes under which this proceeding is instituted apply to the office — chamberlain or treasurer of a municipal corporation created by special charter — which each of the parties to this proceeding claim to be entitled to? *Quære?*

Special Term, June, 1885.

APPLICATION for books and papers under article 5, title 6, chapter 5, and part 1 of the Revised Statutes (1st ed., 114; 1 R. S. [2d ed.], 114; 1 R. S. [7th ed.], 376).

R. A. Parmenter, Mr. Griffith and Mr. Merritt, for Bridgman.

Esek Cowen, for Hall.

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Held, that as the evidence was produced for the purpose of protecting the estate of the deceased, and to uphold a contract made by him in his lifetime with the defendant, he executors, as his personal representatives, possessed the right and privilege of releasing the physician from the statutory obligation of secrecy, and defendant had no ground for an exception.

After the plaintiff had introduced all his evidence on the question of the insanity of the deceased, and had rested his case for the second time, the defendant offered evidence to show the nature of the insanity of the deceased, and that the insanity with which he was afflicted was hereditary in its character. The offer was rejected upon the ground that the defendant's case had been rested, and that it had not been pleaded:

Held (BARKER, J.), that the first reason for rejecting the evidence was not well founded for the reason that prior to the time of this offer it would not have been pertinent for the defendant to give any evidence on the subject of the insanity of the insured, as no question had then been made as to such insanity. The plaintiff raised that question and gave evidence tending to prove the insanity of the insured at the time he took his own life, with a view of avoiding the legal effect of the act, and the defendant sought to meet this position of plaintiff and to show the nature and degree of the insanity, and this made the evidence offered material and competent (SMITH, P. J., and HARDIN, J., dissenting).

Held, further (BARKER, J.), that the other ground was equally without foundation, as it is set forth in the answer that it was a condition of the contract, in case the insured should commit suicide or die by his own hand, the policy of insurance should become null and void, and it is also alleged he did commit suicide and did die by his own hand.

Fourth Department, General Term, October, 1883.

Before JAMES C. SMITH, P. J., HARDIN and BARKER, JJ.

APPEAL from an order denying a new trial, founded on the judge's minutes. Since then a case has been made containing the evidence produced on the trial.

The action is founded on a policy of insurance issued upon the life of the deceased, the plaintiffs being the executors of his last will and testament.

The verdict was in the plaintiff's favor for the sum of \$4,188.

Westover agt. The Ætna Life Insurance Company.

Rollin Tracy, for appellant.

S. E. Payne, for respondent.

BARKER, J. — The contract of insurance was based upon a written application made by the insured and presented to the company, in which the applicant made representations as to the state of his health at that time and previous thereto. Such statements and representations were made by way of answer to written questions propounded on behalf of the company. In reply to an interrogatory the insured stated that he had never been insane. This answer was followed by an inquiry put in this form: "Has either of the parents, brothers, sisters or other near relations of the party been afflicted with rheumatism, insanity or with pulmonary, scrofulous or any other constitutional disease hereditary in its character?" This question was answered in the negative. The policy contained an express condition and agreement that all the answers, statements and representations should constitute a part of the contract, and were warranted by the insured to be true in all respects, and if they were not then the contract to be absolutely null and void.

One of the defenses interposed by the company is that Mrs. Branch, a sister of the insured, was, or had been at the time the application was made and the policy issued, insane, and on the trial gave evidence tending to prove the truth of the answer in this respect.

In the charge as given to the jury they were instructed in substance that if they found as a fact that Mrs. Branch was or had been at time of the application insane, and the same was of a temporary character only produced by physical causes at that time existing, it would not constitute a breach of any condition of the policy and thereby render it void; that to bring the case within the limits of the contract in this respect so as to constitute a defense and defeat a recovery, it must be made to appear that the insanity which afflicted

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sion of the office by force, which was partially successful, which attempt was, however, restrained by this court and the possession of the office restored to Hall in a suit brought by Hall against Bridgman, an action by the people on the relation of Bridgman against Hall, for the purpose of ousting Hall from the office and also placing Bridgman in possession thereof, was commenced.

This action was brought to trial at the Rensselaer circuit in May, 1885, and resulted in a verdict in favor of the defendant upon both issues, upon which judgment was perfected which adjudges and decrees "that the relator, John F. Bridgman, is not the chamberlain of the city of Troy, and that the defendant, Benjamin H. Hall, is the chamberlain of the city of Troy and has been such chamberlain since the 26th day of January, 1885."

The judgment also contains this further clause: "But nothing herein contained shall prejudice any right on the part of the people of the state of New York, or any person who, since the rendition of the verdict herein, shall have been or shall hereafter be duly appointed to the office of chamberlain of the city of Troy, and shall qualify as required by law."

On May 21, 1885, mayor Fitzgerald addressed another communication to the common council of the city of Troy, in which he recites the various matters hereinbefore detailed, and concludes thus: "Now, therefore, I have the honor to nominate John F. Bridgman, of this city, as chamberlain of the city of Troy for the ensuing term of three years."

The vote of the common council, which was immediately taken, was two in favor of confirmation and ten against it. The president announced that the nomination was confirmed because not rejected by a two-third vote.

Under this last appointment, Bridgman having qualified and given a bond, which has been duly approved, claims the office of chamberlain of the city of Troy, and institutes this proceeding, after Mr. Hall had, on demand made, refused to

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surrender them to him, to obtain the books and papers belonging to such office.

A preliminary objection made in behalf of Mr. Hall must be first considered, which is this: Do the provisions of the Revised Statutes under which this proceeding is instituted apply to the office — chamberlain or treasurer of a municipal corporation created by special charter — which each of the parties to this proceeding claim to be entitled to?

If this was an original question, now for the first time presented, there would, as it seems to me, be no difficulty in giving it a negative answer. The proceeding is instituted under article 5, title 6, chapter 5 and part 1 of the Revised Statutes (1st ed., 114; 1 R. S. [2d ed.], 114; 1 R. S. [7th ed.], 376). The chapter is entitled (1st ed., 85): "Of the *public officers of this state*, other than militia and town officers; their election or appointment; their qualifications and the tenure of their offices." Title one of that chapter is entitled (1st ed., 86): "Of the number, location and classification of the *public officers of the state*." That title then proceeds to classify, *name* and locate the officers, who in the title of that chapter are called "the public officers of *this state*," and in that title "the public officers of *the state*," and among them is no such officer as these parties profess to be. Article 5 of title 6 (that under which the present proceeding is instituted) is entitled (1st ed., 114): "Proceedings to compel the delivery of books and papers by *public officers* to their successors."

From this statement it would seem reasonably clear that the term "public officers," used all through the chapter, and who are also therein called "the public officers of *this state*" and "the public officers of *the state*," and who are also named, located and classified in the same chapter, cannot possibly include an officer not named, and who, instead of being one of "the public officers of *this state*" or "of *the state*," is simply and only an officer of a *municipality or city* created by special charter. It would seem to be almost as proper, in the absence of an express statute, to call an officer of a railroad

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or other corporation a "public officer of the state" as to call a public officer of a *city*, created by special charter, by that name.

The difficulty, however, with this line of thought is that the practice has been the other way in the state, and courts and judges have, though without the point being made, acted upon the assumption that the statute reaches officers of the character of that which this proceeding involves. Sitting as a single judge, the officer to whom this application is made dislikes to disturb a long practice, but certainly the point is well worthy of the attention of an appellate tribunal. While refusing, therefore, to dismiss the present application upon this ground alone, the point nevertheless adds one more difficulty to several others about to be stated, which compel the denial of the present application.

Conceding, however, that the statute is applicable to a city officer not named therein, should the order asked for by Mr. Bridgman be granted?

The current of authority is that only in a clear case, or in one free from reasonable doubt, should the authority conferred by the statute be exercised (*Matter of North* agt. *Cary*, 4 *N. Y. Sup. Ct. R.*, 357; *The People* agt. *Allen*, 42 *Barb.*, 203; *People* agt. *Allen*, 51 *How*, 97, 99, 100). The case should be *very* clear, because the revisers of our statutes, in reporting the provision, said (3 *R. S.* [2d ed.], 444): "It has occurred to the revisers, after much reflection, that there can be no reason why a short, summary and effectual remedy should not be given when a person *willfully* withholds public papers. They have accordingly prepared the subsequent sections, which provide for final coercive measures, only in case of a party *obstinately* refusing to deliver and to swear that he has delivered all the papers within his knowledge." The aim of the revisers was to give this remedy "*only*" when the case was so clear that the conduct of the party in refusing to deliver could be called *willful* or *obstinate*, terms absolutely inapplicable to a case in which a person in *good faith* holds possession of an office supposing himself to be its lawful

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incumbent, and, with that possession, the custody of books and papers essential to the proper discharge of its duties.

In applying these principles to the present case it is proper to see what this motion involves.

The claim of Mr. Bridgman is that Mr. Hall was only appointed to act during the absence of Mr. Church; that if the office of chamberlain was then vacant by the misconduct and flight of its incumbent, the appointment of Hall as a temporary one during such absence was void, or if good as a temporary appointment it ceased with Church's return and resignation.

The claim of Mr. Hall, on the other hand, is that, it being conceded that Church was a defaulter and a fugitive the office of chamberlain became vacant, and that the mayor's nomination and selection of Mr. Hall to perform its duties under such circumstances was in law an appointment to fill the vacancy; or if this position be not maintainable, then that the decision of this court, in the action to recover the possession of the office, in which the validity of defendant's title thereto was involved and which title is the same as now made, "that the defendant, Benjamin H. Hall, *is the chamberlain of the city of Troy, and has been such chamberlain since the 26th day of January, 1885,*" is conclusive as to the validity of the appointment under which he claims and holds.

The determination of these claims between the parties involves, 1st. A construction of several important parts of the charter of the city of Troy; 2d. The settling of the facts in regard to the alleged defalcation and flight of chamberlain Church; 3d. Whether or not by those facts the office became vacant; 4th. The meaning, intent and legal effect of the nomination by the mayor of Mr. Hall. Was it intended to give, or did it in law give to Mr. Hall the title to a vacant office, or was it void as attempting to do what the mayor could not do, to wit: temporarily fill a vacant office; or, if good as a temporary appointment, what effect did the resignation by Church and the appointment of Bridgman have? 5th.

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The effect of the judgment of this court in the action to recover the office; 6th. How far can the legal effect and operation of the judgment be controlled by the proceedings of the trial showing the intent and reasons of the judge rendering the judgment and decision; or must the party, if he wishes to control the effect of the broad words used — “Benjamin H. Hall *is the chamberlain* of the city of Troy;” not that he is in the lawful possession of the office under an appointment by the mayor “to discharge the duties of the office,” as the charter provides, “in the event of the sickness or absence of the chamberlain * * * during such sickness or absence” — apply for a modification or amendment of the judgment; and how far is the declaration of the effect of the judgment contained in the roll restrictive of its operation?

It is not my purpose or design to argue or discuss any of these questions. The attempt so to do would almost involve a decision. They are difficult questions, so difficult as to prevent me from holding that the title of Mr. Bridgman is so clear and free from doubt that Mr. Hall's conduct in refusing to surrender the books and papers of the office is either “willful” or “obstinate.”

In *Case agt. Campbell*, in which the general term of this department (17 *Weekly Dig.*, 473) held that a county judge had no power to take evidence as to the vote cast for the office of supervisor of a town, to determine the right to the books and papers belonging to the same office, and which case was before me upon a motion to vacate the stay granted pending an appeal, the questions of law and fact were less intricate than those in the present case, and the decision then made must control. The court, in the case referred to (see also the opinion of the judge writing this opinion, in same proceeding and cases therein cited, 2 *How. [N. S.]*, 85), further held: “There is a dispute as to the title of the office. The proceedings taken here are not to be used as a substitute for an action of *quo warranto*. The people must sue to oust

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an intruder, and probably the alleged intruder is entitled to a jury trial." These remarks are applicable to the present case. "There is a dispute as to the title of the office." The individual against whom the proceeding is taken believes in good faith (see his affidavit) that he is the lawful incumbent of the office to which the books and papers belong. This fact not only takes the case out of the intent which its framers had in view in reporting the statute upon which this proceeding is predicated, but it also brings us face to face with another difficulty, which is this: The possession of the books and papers does not give possession of the office. Mr. Hall, though the books and papers of the office were taken from him, would still possess and exercise the functions of chamberlain of the city of Troy. He would still be the custodian of its funds and possessor of its powers. The removal from his care of the books and papers would only cripple and embarrass him in the discharge of the duties, by which the municipality alone would suffer. Should, under such circumstances, the order be made? The answer is clear—it should not. If Mr. Bridgman is right in his views he can recover in the course of a very few months, at the farthest, the office and its emoluments during the time Mr. Hall has withheld its possession from him. The questions involved are too important, in my judgment, to be disposed of in this summary manner. If I am wrong in this view, however, then this speedy determination of the present proceeding, to which he was clearly entitled, will enable him to review and correct any error at the coming general term, now only two months distant.

The application is denied, but without prejudice to an action to recover the office.

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N. Y. COMMON PLEAS.

ALEXANDER V. DAVIDSON, sheriff, &c., agt. THE MAYOR, &c.,
OF NEW YORK.

Sheriff—Fees of — Chapter 279, Laws of 1884, should be construed to apply to future appointments and not to persons in office at the time of its passage.

The act (chapter 279 of the Laws of 1884), is not sufficient to authorize the board of estimate and apportionment to fix the fees, per centages and allowances of the present sheriff, during his term of office, at the rates set forth in their resolution of December 29, 1884, for services thereafter to be rendered.

The act construed as not authorizing any interference with the fees of the then incumbent of the sheriff's office, but the fixing of compensation authorized deemed to apply to his successors in office.

General Term, July, 1885.

Before DALY, Ch. J., J. F. DALY and ALLEN, JJ.

W. Bourke Cochran, for plaintiff.

E. Henry Lacombe, for defendant.

Charles P. Miller, of counsel.

J. F. DALY, J. — The legislature is prohibited from passing any private or local bill creating, increasing or decreasing fees, per centages or allowances of public officers during the term for which said officers are elected or appointed (*Const., art. 3, sec. 18*). The act under examination is a local bill, being "an act to regulate and provide for certain expenses of conducting the office of sheriff of the city and county of New York." It does not directly fix the fees of the sheriff, but it takes away from the board of aldermen of said city and gives to the board of estimate and apportionment of said city the power to fix the rates of payment to the sheriff for objects of expenditure which, by law, are made a charge upon said city and county.

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The board of aldermen, exercising the powers of supervisors (*chap. 304, Laws of 1874*), adopted an ordinance on January 21, 1875, fixing the compensation of the sheriff for such objects at a specified rate. The plaintiff assumed the office of sheriff on January 1, 1883, and the act of the legislature under examination was passed on May 14, 1884. The board of estimate and apportionment adopted on December 29, 1884, a resolution by which they allowed a lower rate for such objects than that fixed by the board of aldermen.

It thus appears that while the legislature did not directly reduce the fees of the sheriff, it accomplished such reduction indirectly by transferring from one local authority to another the power to make the change of compensation. The prohibition against doing an act extends, of course, to all indirect, roundabout or covert attempts to do the thing forbidden.

In the case of the legislature, the prohibition against passing a local bill decreasing official fees extends to enactments which confer upon others the power to do so at their pleasure. If it did not, the provisions of the constitution might be easily evaded. It is not to be supposed that the legislature intended in the act of 1884, under examination, a violation of the constitutional provisions above cited, and therefore the act will not be construed as authorizing any interference with the fees of the then incumbent of the sheriff's office. The fixing of compensation authorized will be deemed to apply to his successors in office.

We held in a similar case that the legislative enactment should be construed to apply to future appointments, and not to the persons in office at the time of its passage (*Ricketts agt. The Mayor*, 57 *How. Pr. R.*, 320). The correctness of the application of the principle in that case may be doubtful in view of the later decision of the court of appeals in *Manham agt. The City of Brooklyn*, holding that the constitutional provision in question did not protect salaried officers, but was to be confined to those whose compensation was by fees, per centages and allowances. But the principle on which

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the decision was based is directly applicable to the case before us, and the opinion therein delivered must control.

I think that judgment should be ordered for plaintiff.

DALY, C. J., and ALLEN, J., concurred.

COURT OF APPEALS.

ROBERT R. WESTOVER, as executor, &c., of HIRAM GOVE,
deceased, agt: THE AETNA LIFE INSURANCE CO.

*Code of Civil Procedure, section 884 — When physician not allowed to testify—
Personal representatives cannot waive prohibition of statute.*

By section 884 of the Code of Civil Procedure, a physician is prohibited from disclosing any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, and the seal of the law placed upon such disclosures can be removed only by the express waiver of the patient himself.

Whenever the evidence comes within the purview of the statute it is absolutely prohibited and may be objected to by any one, unless it be waived by the person for whose benefit the statute was enacted.

An executor or administrator does not represent a deceased person for the purpose of making such a waiver. He represents him simply in reference to right of property and not in reference to those rights which pertain to the person and character of the testator (*Reversing S. C., ante, 168*).

Decided April, 1885.

THIS is an appeal from an order of the supreme court, general term, fourth department, affirming an order denying a motion for a new trial upon the minutes of the court, and denying a motion for a new trial made upon a case and exceptions, and from the judgment entered on such order. This action is brought to recover upon a life insurance policy issued by the defendant upon the life of Hiram Gove, on the 11th day of July, 1874, upon the application of said Gove,

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for the sum of \$4,000, payable to himself within ninety days after due notice and proof of death. Gove, the insured, died on the 15th day of October, 1881. The plaintiff, Robert R. Westover, was appointed executor of the estate of said Gove on the 9th day of November, 1881. On the 12th day of January, 1882, the plaintiff prepared and furnished proofs of loss, and at the expiration of ninety days, the policy not being paid, this action was commenced.

In and by the express provisions of this contract of insurance, it was, among other things, mutually agreed by and between the assured and the defendant, and the policy was issued by the defendant and accepted by the assured, upon the express condition and agreement that in case the assured should commit suicide, or die by his own hand, the policy should become and be null and void.

It was also, in and by the express terms and conditions of said policy of insurance, and in and by the express terms and conditions of the application for said policy, which, by the express terms and conditions of said policy, and of said application, was made a part of the contract of insurance, expressly agreed and warranted, among other things, by and on the part of the assured and the defendant, and the policy was issued upon the express agreement and warranty of the assured, that the answers, statements, representations and declarations contained in or indorsed upon the said application, were and each of them was in all respects true, and that if said policy was obtained by or through any fraud, misrepresentation or concealment, or by any false statement, the policy should be absolutely null and void, and all moneys which may have been paid on account thereof should be forfeited to the defendant. In and by the application for said policy, the assured, among other things, stated and declared and warranted that "neither of the parents, brothers, sisters or other near relatives had been afflicted with rheumatism, insanity, or with pulmonary, scrofulous or any other constitutional disease, hereditary in its character." It appeared that Gove committed suicide, or

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died by his own hand, and that at least a sister of the assured had been insane. These conditions and facts raised various questions, which are fully stated in the annexed points, and submitted for consideration. The cause was tried before Mr. justice Dwight and a jury, on the 9th, 10th and 11th days of January, 1883, resulting in a verdict in favor of plaintiff for \$4,188, the full amount of the policy. A motion was thereupon made for a new trial upon the minutes of the court, which was denied, and from the order denying such motion an appeal was taken. Upon the rendering of the verdict the case was ordered to be heard in the first instance at general term, upon case and exceptions, and judgment directed to be entered as security, and all proceedings thereon to be suspended until the hearing and determination at general term. The cause was accordingly heard at general term, resulting in an order affirming the order appealed from, and denying the motion for a new trial upon case and exceptions, and directing judgment upon the verdict and judgment was accordingly entered. And the case comes here on appeal from that order and judgment.

Rollin Tracy, for defendant, appellant, made and argued among others the following point:

I. The evidence of Dr. Briggs as a witness for the plaintiff should have been excluded as privileged, under section 833 of the Code of Civil Procedure, under the objection of the defendant. The plaintiff called Dr. Briggs as a witness in his behalf, and after showing by the witness that he was, and for upwards of fifty years had been a practicing physician; that he knew the insured in his lifetime, attended him professionally, and visited him first on the 29th day of June, 1881, the witness was allowed to testify as to how he found the assured, his treatment, &c., under the objection of the defendant. "That the evidence was incompetent and privileged under section 834 of the Code of Civil Procedure. The witness being a practicing physician and the evidence being a disclosure of information

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acquired by him in attending Gove in a professional capacity, and necessary to enable him to act in that capacity, the witness should not be allowed to testify and disclose the information so acquired." The evidence introduced under this objection was for the purpose of establishing the insanity of the insured as the cause of suicide, a fact necessary to be established to enable the plaintiff to recover, and was the most serious evidence upon that question in the case. The section of the Code under which the objection to this testimony was made is as follows :

"Sec. 834. A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." This statute absolutely prohibits the physician from disclosing any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity. The evidence of the witness was clearly "a disclosure of information acquired by him in attending the insured in a professional capacity, and which was necessary to enable him to act in that capacity. And unless there is some statute relieving this section from this absolute prohibition, this evidence was improperly admitted under this exception. No such relief is to be found, unless it be under section 836 of the Code, which provides : "Sec. 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing the patient or the client " The three sections referred to are those relating to confessions made to clergymen, the information furnished physicians, and the communications to an attorney ; and its only materiality here is as to its bearing upon section 834, referring to information furnished physicians by the patient, &c. This section (836) seems to be merely for the purpose of enabling the patient to waive the prohibition of the other section (834) and allow the evidence of the physician to be introduced when offered by the party opposed, not for the purpose of enabling the

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patient to introduce the evidence of his own physician, and the statements of himself to his physician in his own behalf against his adversary, whether true or false, in defiance of the prohibition of section 834, and the objection of his adversary, thereby enabling the patient (or his representative) to produce evidence for himself which might not otherwise exist, and which might have been false in fact and an imposition upon his physician, and manufactured with an intent to perpetrate a fraud upon his adversary. No case is found where, as in this case, the insured or his representative seeks to introduce such testimony in his own behalf. All the cases are where the insurance company seeks to introduce the testimony of the physician against the interests of the insured, the patient, and in such cases the insured may, by express waiver, allow the evidence. To say that the statute means that only the patient or his representative shall have the right to object to such evidence, and while he only can waive the prohibition, he may waive it in his own behalf, would be opening the gate for the manufacture of evidence, and for fraud of the most dangerous character, and a violation of the greatest safeguard known to the rules of evidence, that no man shall be allowed to prove his own statement in his own interest. The courts uniformly say that no definite or final construction can be put upon this section, but it is a rule of itself, to be construed and applied with reference to each case (*Pierson agt. The People*, 79 *N. Y.*, 424). The right of the defendant to object in such cases seems to be fully recognized by this court in the case of *Edington agt. The Mutual Life Insurance Company* (67 *N. Y.*), the only case where reference to this question seems to be directly referred to, where the court says (p. 195), "there is no ground for claiming that the right of objecting to the disclosure of a privileged communication is strictly personal to the party making it, or to his personal representatives, and that it cannot be available to a third party." The general term sustained this ruling upon the theory that the prohibition of the statute could be removed by the party, or

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his legal representative, for the purpose of protecting the estate of the deceased; and to uphold a contract made by him in his lifetime with the defendant. And in support of this conclusion cited *Staunton agt. Parker* (19 *Hun*, 59); *Edington agt. Mutual Life Insurance Co.* (67 *N. Y.*, 196); *Parish Will Case* (25 *N. Y.*, 9, &c.). But these cases fail to sustain the position. In *Staunton agt. Parker*, three daughters of the testator contested the probate of a codicil to the testator's will, and offered the privileged evidence to overcome that instrument against the executor, who sought to sustain it, and who objected to the evidence as privileged, &c. It was held that the privilege could be waived by the contestants, as heirs, &c., of the testator. And it was also held that the evidence was competent because it did not appear that the information sought was not the disclosure of any confidential information acquired by the physician in his professional capacity, but facts which were open to the observation of any person who had seen and conversed with the testator. An application of the first reason to the present case clearly sustains the position of the defendant; and this court in *Grattan agt. Metropolitan Life Insurance Company* (80 *N. Y.*, 297), has disposed of the second reason adversely. In *The Parish Will Case* it seems the evidence was received without objection. And in *Edington agt. Mutual Life Insurance Company* it already appears that this court stated (*p.* 195), that "there is no ground for claiming that the right of objecting to the disclosure of a privileged communication is strictly personal to the party making it, or to his personal representatives, and that it cannot be available to a third party." A proposition emphatically favorable to the position of this defendant.

S. E. Payne, for plaintiff, respondent. The defendant objects to the evidence of the doctor who attended the assured, on the ground of privileged communications. The plaintiff is the personal representative, and, as such, had a right to waive the privilege of the statute, which he did by

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calling the witness (*Code*, sec. 886; *Stanton* agt. *Parker*, 19 *Hun*, 55, 59; *Edington* agt. *Mutual Life Co.*, 67 *N. Y.*, 196; *Greenleaf*, sec. 243).

EARL, J. — This action was commenced upon a life insurance policy issued to the plaintiff's testator. It was provided in the policy that it should be void if the insured should commit suicide or die by his own hand. He hanged himself, and upon that ground the action was mainly defended. The plaintiff gave evidence tending to show that the testator hanged himself while insane, and the question was submitted to the jury for their determination whether the hanging was the voluntary, conscious, willing act of the testator, or whether he was at the time so insane that he was either unconscious of the act which he performed, or was unable to understand what the physical consequences of it would be; and upon that question the jury found for the plaintiff. In the course of the trial the plaintiff called a physician who had known the insured for a long time and who attended him professionally a short time before his death. He testified that he visited him first in June, 1881, and he was asked this question: "State how you found him?" The counsel for the defendant objected to the question on the ground that "the evidence was incompetent and privileged under section 834 of the Code of Civil Procedure, viz.: The witness being a practicing physician and the evidence being a disclosure of information acquired by him in attending Gove in a professional capacity and necessary to enable him to act in that capacity, and the witness should not be allowed to testify and disclose the information so acquired." The court overruled the objection, and the witness answered at length giving important evidence as to the mental and physical condition at that time and subsequently of the insured. The claim of the learned counsel for the respondent on the argument before us was that the plaintiff, as the personal representative of the deceased, could waive the seal which the statute puts upon

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such evidence, and upon that ground the ruling of the trial judge was sustained by the general term.

Section 833 of the Code provides that "a clergyman or other minister of any religion shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs." Section 834 provides "that a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Section 835 provides that "an attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment," and section 836 provides that "the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or client." It is thus seen that clergymen, physicians and attorneys are not only absolutely prohibited from making the disclosures mentioned, but that by an entirely new section it is provided that the seal of the law placed upon such disclosures can be removed only by the express waiver of the persons mentioned. Thus there does not seem to be left any room for construction. The sections are absolute and unqualified. These provisions of law are founded upon public policy, and in all cases where they apply the seal of the law must forever remain until it is removed by the person confessing, or the patient or the client (*Edington agt. Mutual Life Ins. Co.*, 67 N. Y., 185; *Edington agt. Aetna Life Ins. Co.*, 77 N. Y., 564; *Pierson agt. The People*, 79 N. Y., 424; *Grattan agt. Metropolitan Life Ins. Co.*, 80 N. Y., 281).

In Greenleaf on Evidence (*sec.* 243), speaking of communications made to an attorney, the learned author says: "The protection given by the law to such communications does not cease with the termination of the suit or other litigation or

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business in which they were made; nor is it affected by the party ceasing to employ the attorney and retaining another; nor by any other change of relations between them; nor by the death of the client. The seal of the law once fixed upon them remains forever, unless removed by the party himself in whose favor it was there placed. It is not removed without the client's consent, even though the interests of criminal justice may seem to require the production of the evidence." In Wharton on Evidence (*sec.* 584), it is said that the privilege of the client may be waived by him, but that "the evidence of the waiver must be distinct and unequivocal." In *Pierson agt. The People*, it was said: "The plain purpose of this statute was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead." In *Grattan agt. The Metropolitan Life Insurance Company*, DANFORTH, J., said: "The case before us is not one where the witness was called in for the first time after the death of the patient, but one where the lips of the physician were sealed during the life of the patient, and where, although by death he loses the patient, his lips must remain closed. It was held under the old law that the seal must remain until removed by the patient, and it is now so provided by statute."

The purpose of the laws would be thwarted, and the policy intended to be promoted thereby would be defeated if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney, or a penitent to his priest. Whenever the evidence comes within the purview of the statutes it is absolutely prohibited, and may be objected to by any one unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications

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and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property and not in reference to those rights which pertain to the person and character of the testator. If one representing the property of a patient can waive the seal of the statute because he represents the property, then the right to make the waiver would exist as well before death as after, and a general assignee of a patient, for the purpose of protecting the assigned estate, could make the waiver; and yet it has been held that an assignee in bankruptcy is not empowered to consent that the professional communications of his assignor shall be disclosed (*Bowman agt. Norton*, 5 C. & P., 177). In *Edington agt. The Mutual Life Insurance Company* (67 N. Y., 185), it was not decided nor stated that a personal representative could waive the protection of the statutes, but it was held that the personal representative or assignee of the patient could make the objection to evidence forbidden by the statutes; and the opinion might have gone further and held that any party to the objection, as the evidence in itself is objectionable, unless the objection be waived by the person for whose protection the statutes were enacted.

Without further discussion or citation of authorities, we think the statute admits of no other construction than that where the evidence comes within the prohibition of the statute, its reception, if objected to, can be justified only when the patient, penitent or client, as the case may be, waives the protection the statutes give him.

We are, therefore, of opinion that for the error in the reception of the evidence objected to, the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

In the Estate of Charles Morgan, deceased.

SURROGATE'S COURT

In the Estate of CHARLES MORGAN, deceased.

Code of Civil Procedure, section 2643—Who entitled to receive letters of administration with will annexed under this section—When strangers may be appointed co-administrators.

Where there are two or more persons equally entitled, under section 2643 of the Code, to receive letters of administration with will annexed, the surrogate will appoint that person who *ceteris paribus* has the largest interest under the will.

Section 84, title 2, chapter 6, part 2, Revised Statutes, which declares that joint "administration" may, with the consent of persons entitled, be granted to themselves and to other persons not entitled, applies to cases of administration with the will annexed.

New York county, August, 1885.

ROLLINS, S. — Mary J. Morgan, late executrix of this testator's estate, died on the third of July last, leaving its assets in part unadministered. Mrs. Frances E. Quintard, decedent's eldest daughter and a legatee under his will, has applied for the issuance of joint letters of administration with the will annexed to herself, her husband George W. Quintard, and James Rintoul. The right to receive such letters as are here applied for is granted by section 2643 of the Code of Civil Procedure to persons interested in a testator's estate, according to the following order of priority:

"*First.* To one or more of the residuary legatees who are qualified to act as administrators.

"*Second.* If there is no such residuary legatee, or none who will accept, then to one or more of the principal or specific legatees so qualified."

The will of this testator contained but one dispositive clause. That clause gave his entire estate "as provided by the laws of the state of New York in case of intestacy." The persons who thus became entitled to share in the testator's bounty, and the respective interests that they had in the estate upon

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probate of the will, were as follows: Mary J. Morgan, widow, thirty-ninetieths; Frances E. Quintard, daughter, twelve-ninetieths; Maria L. Whitney, daughter, twelve-ninetieths; Richard J. Morgan, grandson, twelve-ninetieths; Montaigu Morgan, grandson, four-ninetieths; William H. Morgan, grandson, four-ninetieths; Laura L. La Montagne, granddaughter, four-ninetieths; Henry W. Harris, great-grandson, three-ninetieths; Henry H. Wilson, great-grandson, six-ninetieths; Maria L. Harris, great-granddaughter, three-ninetieths.

It is evident that the above named persons, though their interests under the will vary in quantity, are legatees nevertheless of precisely the same grade and character. It cannot be said that any one of them, as distinguished from any other, is a "residuary" or a "specific" legatee. Nor is it true that any one of them, as distinguished from any other, is one of the "principal legatees." For the word *principal*, when read in the light of the context, is evidently not used as a synonym for *chief* or *most important*, but has the force and effect rather of the word *general*, and is meant to be descriptive of all legatees who are neither specific nor residuary. I hold, therefore, that no one among this testator's living beneficiaries has any absolute legal right, as such, to be chosen in preference to any other as administrator *c. t. a.* of this estate, except as hereinafter indicated. Of those beneficiaries Mary J. Morgan, Richard J. Morgan, Montaigu Morgan and Henry H. Wilson are dead. Henry W. Harris and Maria L. Harris are personally incompetent because of their infancy, and any claim that might be made by their guardian is secondary to the claim of an adult legatee legally qualified (*Sec. 33, tit. 2, chap. 6, pt. 2 R. S.*; 3 *Banks* [7th ed.], 2291; *Cottle* agt. *Vanderheyden*, 11 *Abb.* [N. S.], 17). The selection must therefore be made from the persons following, unless all of them waive their claims: Mrs. Quintard, Mrs. Whitney, William H. Morgan and Laura L. La Montagne.

The petition of Mrs. Quintard is not, I understand, opposed by Mrs. Whitney. Mrs. Montagne is not herself an applicant

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for letters. Mr. W. H. Morgan applies for his own appointment as co-administrator with the petitioner. The practical questions for decision, are therefore, these: 1. Of the persons entitled, shall I appoint Mrs. Quintard, or Mr. W. H. Morgan, or both? 2. Whoever may be selected among the persons entitled, shall any person *not* entitled be joined in the administration as prayed for by several of the parties in interest?

And first, as between Mrs. Quintard and Mr. Morgan, the claim of the former is supported by this very important consideration, that she has much the larger interest in the estate.

Schouler, in his treatise on Executors and Administrators (*sec.* 124), declares that when the selection of an administrator *c. t. a.* is uncontrolled by statute the rule is to grant letters "to the claimant having the greatest interest under the will." Our own statute is founded on a practice which was established by the ecclesiastical courts, and which is thus expounded by Sir John Nichol in *Tucker agt. Westgarth* (2 *Add.*, 352): "Where it is discretionary in the court to grant administration to either of two claimants it always decrees it, *ceteris paribus*, to that claimant who has the greatest interest in the effects to be administered." (*See, also, to same effect, Elwes agt. Elwes*, 2 *Lee's Cas.*, 573).

Redfield in his *Law of Wills*, says (*vol.* 3, *p.* 97): "In the English courts of probate the general rule seems to have been to give administration first to the party entitled to the residue of the goods, and among those of equal degree to the one in seniority, other things being equal." Tried by this test, it is manifest that the claim of the petitioner is superior to that of her rival applicant. Those who have appeared in opposition, and who are themselves legally competent to receive letters, have much less interest under the will than those legally competent who support or approve her application. And while there is on the part of several persons now interested in the estate, including the representatives of Mrs. Charles Morgan, some opposition to Mrs. Quintard's appointment, except upon certain conditions as to co-administration, which she has not

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indicated her willingness to accept, it is nevertheless true that her application is favored by a much larger interest than the interest which has declared itself on the side of Mr. W. H. Morgan. I should therefore have no hesitation whatever in granting her petition but for the objection that her relation to a proceeding now pending in the court of appeals, involving the construction of this testator's will and the ascertainment of the amounts to which his several legatees are entitled thereunder, make her an unfit person to be intrusted with the sole charge of the estate.

As to this objection it may be said in the first place that the facts on which it is founded do not constitute a disqualification under the statute prescribing the qualifications of administrators. She could insist, in spite of it, upon her absolute right to letters if she were, for example, sole residuary legatee, or if the three persons whose statutory *status* is the same as her own were all dead or were all unwilling to administer.

The standard of incompetency fixed by the written law can alone be applied in passing upon the qualifications of an applicant to whom that law has given priority; and indebtedness to the estate or personal interest in its administration are not of themselves grounds of disqualification (*Churchill agt. Prescott, 2 Bradf., 304*). I might very likely regard Mrs. Quintard's relations to the controversy in the court of appeals as sufficient, other things being equal, to warrant the selection in preference to herself of some person equally entitled, against whom that objection could not be urged, if there were any such person in existence. But there is not; and as between Mr. Morgan and herself, if either is to be intrusted with the administration to the exclusion of the other, I am disposed to give her the preference.

Now it is not, in my judgment, desirable that letters should issue to the two in conjunction. There is little reason to believe that their counsels would be harmonious, or that their joint action would result in measures conducive to the best

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interests of the state. Besides, if Mrs. Quintard shall become sole administratrix, I cannot think that the weight of her official authority will become practicably oppressive to the other legatees who now object to her appointment. Those objectors are all parties to the proceeding in the court of appeals, and are represented by able and zealous counsel. The issues involved have already been the subject of controversy before a referee, the surrogate and the supreme court, and have given rise to searching and elaborate discussion. Under the circumstances it is extremely unlikely that the parties litigant would or could be helped by the appointment of an administrator in sympathy with their own contention, or would or could be injured by an appointment from the ranks of the opposition.

There remains to be considered the question whether a stranger to an estate can be granted letters of administration *c. t. a.* jointly with a person entitled to such letters under section 2643 (*supra*).

It is an every day practice as regards estates of intestates to appoint strangers as co-administrators upon the nomination of the person entitled to letters. This practice is in accordance with the provisions of section 34, title 2, chapter 6, part 2, Revised Statutes (3 *Banks' 7th ed.*, 2291), which declares that "*administration* may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such person; which consent shall be in writing and be filed in the office of the surrogate." Whether this section applies to cases of administration with the will annexed does not seem to have been decided in any reported case, and a doubt is now thrown upon the matter by the fact that in the main the practice and procedure in respect to the appointment of the latter class of officers is now regulated by the Code of Civil Procedure, while as to the administration of estates of intestates the provisions of the Revised Statutes are still in force. This doubt will disappear, however, upon close examination. Section 34

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is one of the original provisions of article 2, which from the time of its enactment has borne this title: "Of granting letters of administration with the will annexed, and in cases of intestacy." I agree with surrogate BRADFORD, *Ex parte Brown* (2 *Bradf.*, 22), in holding that the term "administrator," as used throughout the whole of title 2 of the sixth chapter, was intended to include administrators with the will annexed, except in cases where the context plainly indicates the contrary. That strangers could be joined in administrations *c. t. a.* before the Code came upon the statute book I have no doubt. Now, there is nothing in the Code inconsistent with a continuance of that practice, and section 34 is still unrepealed and still forms a part of article 2.

It will be observed that the surrogate has no authority under that section to depart from the rule of selection established by section 2643 of the Code, except to the extent that the person entitled shall consent in writing to the appointment of co-administrators. I cannot, therefore, of my own motion, grant letters to the administrator of the late executrix, however strongly I might be inclined to do so. I may add, that even apart from the restrictions of the statute the surrogate would not be justified in forcing upon a person entitled an association with a stranger not selected by himself (*Peters* agt. *Pub. Administrator*, 1 *Bradf.*, 200-207, and cases cited).

Letters may issue to Mrs. Quintard, Mr. Quintard and Mr. Rintoul. If the petitioner shall file a written consent for Mr. Moir's inclusion, he also may be granted letters.

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SUPREME COURT.

THE NATIONAL BANK OF PORT JERVIS agt. JESSE C. HANSEE
and JOHN HANSEE.

Practice—Motions and orders—When prior motion a bar upon the principle of res adjudicata—Code of Civil Procedure, section 779—When non-payment of costs stays all proceedings—Payment by surety of a judgment against a principal does not extinguish the judgment as to principal.

On February 14, 1884, the National Bank of Port Jervis, as plaintiffs, by its attorneys recovered a judgment against J. C. H. and J. H., as defendants. The recovery was upon a promissory note of which J. C. was maker and J. accommodation indorser. An execution was issued to the sheriff of Sullivan county, and on April 14, 1874, J. H. paid full amount to attorneys of plaintiff, who then withdrew the execution. The payment was not to extinguish the judgment, but it was to be kept in life and to be assigned to wife of said J. H. On January 24, 1883, such assignment was made to C. S. H., wife of J. H. The judgment-roll was filed in clerk's office of Orange county. A transcript was filed in office of clerk of Ulster county July 11, 1883, and judgment thereon entered in such county, the residence of J. C., and on same day execution issued to sheriff of such county, which was returned unsatisfied to Orange county clerk's office July 18, 1883. The execution was subscribed "A. N. C., Atty. for Pltff.," and stated in body thereof the assignment to C. S. H. on January 24, 1883. The direction to sheriff was to collect execution and judgment out of property of defendant J. C. H. Such execution did not issue at request of plaintiff in the judgment, nor was any leave to issue obtained or granted by order of this court. Several orders for examination of J. C. H. in supplemental proceedings have been obtained by assignee of judgment and are pending before county judge of Ulster county. On return day of first order J. C. H. appeared and claimed that he had paid the judgment in full to J. H., producing receipt, dated December 11, 1880, purporting to be signed and executed by said J. H. J. C. moved at special term to vacate the order for examination, and to set aside the execution and return upon the ground that the judgment had been paid to J., and was extinguished by said receipt. Such motion being resisted by J. H. and wife it was referred to a referee, who found that J. H. did not make nor execute such receipt, and that no payment had been made to J. H. or his wife. The report was confirmed by special term and motion to set aside execution and return with supplemental proceedings based thereon was denied, and \$179.02 costs, &c., upon such motion was

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directed to be paid by said J. C. H. to J. H. On appeal to general term the order of special term was affirmed, with ten dollars costs. The order of general term was granted upon default of J. C., who by order of special term was permitted to move at general term to open such default on payment of ten dollars costs. Of such order J. has not availed himself. The costs of the previous motions of special and general term, have not been paid.

On motion by J. C. H. to set aside the execution and return and the various orders in supplemental proceedings, upon the grounds that leave of the court to issue such execution was not obtained, and that the payment by J. to the attorneys of the plaintiff extinguished the judgment, and he avers that when he made the previous motion he was not aware of the existence of the grounds upon which he now moves:

Held, first, that the prior motion is a bar upon the principle of *res adjudicata*. It is a bar not because the points now made were made, but because they might and should have been made. The moving party, had he used ordinary diligence, could have ascertained the facts upon which he now moves, and this want of diligence would defeat a motion for leave to renew.

Second. The costs imposed upon the first motion made in this matter by the party now moving remaining unpaid, the court is powerless to entertain the present motion, as by the non-payment of such costs all proceedings on the part of the party required to pay them are stayed.

Third. As the orders of the special term and general term adjudging the judgment unpaid are unreversed the motion has no equity to sustain it.

Fourth. The payment of J. H. to the attorneys of the plaintiff did not extinguish the judgment. J. H. was the surety and J. C. H. the principal debtor. Payment by the former did not extinguish the debt, and he could have taken an assignment to himself and enforced it for his own benefit.

Ulster Special Term, May, 1885.

MOTION in behalf of Jesse C. Hansee to set aside an execution issued on a judgment in the above entitled action, and the return thereof by the sheriff of Ulster county to the clerk's office of Orange county; and also to set aside orders for the examination of said Hansee by proceedings supplemental to execution.

A. Schoonmaker, for motion.

W. J. Groo, opposed.

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WESTBROOK, J. — On the 14th day of February, 1874, the National Bank of Port Jervis, as plaintiff, by A. C. & T. A. Niven, its attorneys, recovered a judgment against Jesse C. Hansee and John Hansee, as defendants. The recovery was upon a promissory note of which Jesse C. was the maker and John the accommodation indorser. An execution was issued upon such judgment by the attorneys of the plaintiff to the sheriff of Sullivan county, and on or about April 14, 1874, John Hansee paid the full amount thereof to the attorneys of the plaintiff, who then withdrew such execution. The payment, however, was not to extinguish the judgment, but the same was to be kept in life and to be assigned to the wife of the said John Hansee. On January 24, 1883, such assignment to Cornelia S. Hansee, the wife of John Hansee, was executed and delivered. The judgment-roll in the action was filed in the clerk's office of Orange county, and the original entry of the judgment was there. A transcript of such judgment was filed in the office of the clerk of Ulster county on the 11th day of July, 1883, and judgment then entered in such county. That county was the residence of Jesse C. Hansee, and on the day of its docket and entry therein an execution issued to the sheriff of such county, which was returned unsatisfied to the Orange county clerk's office July 18, 1883. The execution was subscribed "A. N. Childs, attorney for plaintiff," and stated in the body thereof the assignment to Cornelia S. Hansee on January 24, 1883. The direction to the sheriff was to collect the execution and judgment out of the property of the defendant Jesse C. Hansee. Such execution did not issue at the request of the plaintiff in the judgment, nor was any permission or leave to issue it obtained or granted by any order of this court.

Several orders for the examination of Jesse C. Hansee in proceedings supplemental to execution have been obtained by the assignee of the judgment and are now pending before the county judge of Ulster county. Upon the return day of the first of said orders Jesse C. Hansee appeared before said

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county judge and claimed that he had paid the judgment in full to John Hansee, producing as the evidence of such payment a receipt, dated December 11, 1880, purporting to be signed and executed by said John Hansee. The proceeding before the county judge was adjourned, and Jesse C. moved at special term to vacate the order for examination and to set aside the execution and its return, upon the ground that the judgment had been paid to John, and was extinguished by the receipt of the date of December 11, 1880. Such motion was resisted by John Hansee and wife, they claiming that the judgment had never been paid and that the signature to the pretended receipt was not in John's handwriting, nor authorized by him. The affidavits upon such motion being very conflicting by order of the date of August 11, 1883, it was referred to J. Newton Fiero, counselor-at-law of the city of Kingston, to take proof, and to report such proof with his opinion to the court whether or not the said Jesse C. had paid said judgment to John, and also whether or not John had executed the pretended release of said judgment of the date of December 11, 1880. By his report, dated April 14, 1884, the referee found that John Hansee did not make nor execute such receipt, and that no payment on account of such judgment had been made either to John Hansee or to his wife. By order of the special term of the date of May 3, 1884, the report was confirmed, the motion to set aside the execution and return with the supplemental proceedings based thereon was denied, and \$179.02 costs and disbursements upon such motion were directed to be paid by the said Jesse C. Hansee to John Hansee. On appeal to general term by order dated September 9, 1884, the order of the special term was affirmed, with ten dollars costs. The order at general term was granted upon the default of Jesse C., who by order of the special term dated December 13, 1884, was permitted to move at the general term to open such default on the payment of ten dollars costs, and in the meantime if such payment was made the supplemental pro-

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ceedings were stayed pending such appeal. Of such order of the special term Jesse has not availed himself. The costs of the previous motions imposed both at special and general term have not been paid either in whole or in part. Jesse C. Hansee now moves to set aside the execution and return with the various orders in supplemental proceedings, upon the grounds that leave of the court to issue such execution was not obtained, as the law required it to be when the execution issues after the lapse of five years from the entry of the judgment, as it did in this case, without the issue and return of an execution within five years from the recovery of such judgment, and that the payment by John to the attorneys of the plaintiff extinguished the judgment. He avers that when the previous motion was made he was not aware of the existence of the grounds upon which he now moves.

The present one must, however, also be denied for several reasons (which are given without discussion), to wit:

First. The prior motion is a bar upon the principle of *res adjudicata*. It is a bar not because the points now made were made, but because they might and should have been made. The moving party, had he used ordinary diligence, could have ascertained the facts upon which he now moves, and this want of diligence would defeat a motion for leave to renew. It is moreover difficult to appreciate the excuse which Jesse makes for not uniting the present grounds of motion with those urged on the prior occasion. If he supposed no execution had been issued and returned he would have moved to quash the supplemental proceeding on that ground; and if he knew one had been issued and returned, he knew its date, and knew that he had had no notice of motion for leave to issue. Neither had he, as has already been said, any right to assume without inquiry that an execution had been issued and returned within five years, and he cannot be held ignorant of that which he should have known. He has, however, obtained no leave to renew the motion, and without such leave the denial of the previous motion is a bar.

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Second. The costs imposed upon the first motion made in this matter by the party now moving are unpaid, and by the Code of Civil Procedure (*sec.* 779) such non-payment stays "all proceedings on the part of the party required to pay them, except to review or vacate" the order or orders imposing them, "without further direction of the court, until the payment thereof." The court is powerless, without the payment of costs directed to be paid, to entertain the present motion.

Third. As the orders of the special term and general term adjudging the judgment unpaid are unreversed, the motion has no equity to sustain it. If granted, it must be upon the technical ground that the execution issued after five years without the order of the court. An order allowing such issue would undoubtedly have been made on application, because the court now knows, *for the fact has been so judicially determined*, that no part of the judgment has been paid, and the same is wholly unsatisfied; and because the court would, if a motion so to do was made, allow an execution to issue to enforce the payment of this unpaid judgment, it will refuse to vacate and set aside the one already issued (*Bank of Genesee agt. Spencer*, 18 *N. Y.*, 150). By section 724 of the Code of Procedure the court is authorized to "supply an omission in any proceeding" and in this case, *in which all the equities have been ascertained and settled by a full and careful judicial inquiry*, it would be manifestly unjust to refuse to exert the power conferred in behalf of a party who has acted in perfect good faith, and done only that which the court would have allowed him to do had he asked it.

Fourth. The payment by John Hansee to the attorneys of the plaintiff did not extinguish the judgment. John was the surety and Jesse C. the principal debtor. Payment by the former did not extinguish the debt and he could have taken an assignment to himself and enforced it for his own benefit. *Alden agt. Clark*, 11 *How.*, 269; *Bangs agt. Story*, 7 *Hill*, 10; 4 *N. Y.*, 315.)

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In this case the proof is that it was understood that the payment should not extinguish the judgment and that it should be assigned.

The motion must be denied, with ten dollars costs.

SUPREME COURT.

SOPHIA JACQUIN, respondent, agt. CHARLES JACQUIN,
appellant.

Divorce—Action for separation—When husband not punished as for contempt for non-payment of costs awarded in—Code of Civil Procedure, sections 1240, 1241, 1778, 1769, 3343.

The court has no power to punish a husband as for a contempt for non-payment of costs and counsel fee, which he was directed to pay by the final judgment in an action for separation. Such costs and counsel fee should be collected by execution.

First Department, General Term, May, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order adjudging the defendant guilty of contempt, and directing his commitment until he shall pay to the plaintiff the sum of \$681.81, with interest, and the sum of ten dollars costs of motion, together with sheriff's fees on the execution of the warrant of commitment.

The action was brought by the plaintiff, the wife of the defendant, for a separation, and the costs and counsel fee, for the non-payment of which the defendant was adjudged guilty of contempt, were awarded the plaintiff by the final judgment therein.

L. C. Waehner, for appellant.

John M. Bowers, for respondent.

DANIELS, J. — The amount directed to be paid by the order was the costs and counsel fee recovered by the final judgment

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entered in the action. This judgment directed that the defendant should pay the amount to the attorneys for the plaintiff within five days after service upon him of a certified copy of the judgment, and the only point required to be examined is whether the court was authorized to direct his commitment for the non-payment of this sum of money. The amount was fixed and definite and capable of being docketed against the defendant, and collected by means of an execution. And when judgment has been entered for the recovery of a fixed sum of money, there it has been provided by section 1240 of Code of Civil Procedure that it may be enforced by execution. The action was for a separation, and it resulted in such a judgment in favor of the plaintiff. In an action of this description it has been provided by section 1773 of the Code of Civil Procedure that the defendant may be punished for his failure to make payment of any sum of money as that may be required by the judgment or order referred to in the preceding section. But that section does not include that part of the judgment which may be entered for the recovery of costs. It has been expressly limited to that part of the judgment requiring the husband to provide for the education and maintenance of any of the children of the marriage, or for the support of his wife, and to the non-payment of money directed to be paid by orders provided for in section 1769. That section has been limited to orders made during the pendency of the action by which the husband may be required to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide for the education and maintenance of the children of the marriage, or for the support of the wife. Neither this section nor either of the others referred to include so much of a final judgment as may be entered for the recovery of the costs and expenses of the action, except that section 1769 has permitted the court to order the payment of final costs to be made out of property sequestered or otherwise in the power of the court.

It is evident from this construction that the recovery of

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final costs secured the attention of the legislature in the enactment of the section. But while this authority was given to the court to direct their payment out of property sequestered or otherwise in its power, no authority to punish the defendant by a proceeding for a contempt for non-payment of final costs was conferred by this, or either of the other sections, and if such authority was intended to have been given, it is reasonable to suppose that it would have been found in one or more of these sections of the Code, enacted as declaratory of the rights of the parties, and to prescribe the mode of proceeding in actions of this description. The absence of such a power from these sections is a very cogent indication that it was not designed to be possessed by the court; but that the power to punish the defendant for contempt was intended to be limited to his failure to comply with orders made during the pendency of the action for the payment of money, or directions contained in the final judgment for the education and maintenance of his children and the support of his wife.

It seems to have been supposed that the husband was liable to be punished by way of proceeding for a contempt for the non-payment of final costs, under the authority of section 1241 of the Code. But by subdivision 2 of that section it has been provided that, where the judgment is final and part of it cannot be enforced by execution, as prescribed in the preceding section, the part or parts which cannot be so enforced may be enforced by proceedings for contempt. This limitation of the right to enforce the final judgment plainly excludes that part of it which may be enforced by execution, as the direction for the payment of final costs is always capable of being enforced, and that conforms to the directions contained in subdivision 3 of section 14, which permits a party to be punished by way of contempt for the non-payment of a sum of money ordered or adjudged to be paid only in a case where by law execution cannot be awarded for the collection of such sum. The direction given for the payment of costs in the judgment was not a mandate within the signification of subdivision 3 of section 8, for that

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has been so defined by subdivision 2 of section 3343 of the Code as not to include a fixed sum of money recovered by a final judgment.

The policy indicated by all these provisions of the Code is that such a sum is to be recovered by means of an execution and not to be enforced by proceedings by way of a contempt because of its non-payment. And these provisions require that subdivision 4 of section 1241, providing for the enforcement of a judgment for the payment of money into court or to an officer of the court, should be subordinated to this construction. For care would not have been taken to restrict the right of the successful party to an execution if it had been designed to subject him to proceedings by way of contempt under the more obscure language of this subdivision. What was probably designed by this subdivision was to include such judgments as should be recovered for moneys wrongfully withheld from the court or one of its officers by the defendant, which the court itself would be required to hold for or distribute among parties entitled to receive it. A direction contained in the judgment, as this was, made to pay the final costs to the attorneys, could not well be included within the language of this provision for they are not the officers intended to be included in the subdivision.

The practical effect of *Baker* agt. *Baker* (23 Hun, 356), and *People* agt. *Reilly* (25 Hun, 587), is to sustain this construction of these different provisions of the Code. It is true that in *Lansing* agt. *Lansing* (21 Hun, 248), costs were included in the order made for the punishment of the husband, but as the order also included money required to be paid by him for the benefit of his wife, he could not be relieved from his imprisonment under the order until that payment had been made, even though the further direction for the payment of the costs was unauthorized. (*People* agt. *Jacobs*, 5 Hun, 438, 433; and *affirmed*, 66 N. Y., 8).

The case of *Park* agt. *Park*, (80 N. Y., 156), in no manner conflicts with this construction of these provisions of the

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Code. There the husband was punished for disobeying a lawful mandate of the court, and the costs required to be paid by him were not the costs of the action, but the costs of the proceeding to punish him for his contempt. What was said in the course of the opinion concerning the right to punish the husband for the non-payment of costs is to be received and understood with this qualification, for such costs clearly appear to have been the costs considered by the general term when the case was heard and decided there (18 Hun, 466).

The case of *Howe* agt. *Howe* (5 Weekly Dig., 460), arose before all the present provisions of the Code went into effect. The point could not therefore be there considered as it has now been presented, and that circumstance may have led to the decision which was then made, and as already suggested, the subdivision upon which *Pritchard* agt. *Pritchard* (4 Abb. N. C., 298) was decided cannot be so construed as to include a judgment for the recovery of final costs in an action for a separation. The direction, though formally requiring the costs to be paid to the attorneys, was in substance and effect no more than a final recovery of the costs by the plaintiff in this action against the defendant.

The order from which the appeal has been taken should be reversed, and an order entered denying the motion, but without costs.

DAVIS, P. J., and BRADY, J., concurred.

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SUPREME COURT.

WILLIAM E. ISELIN *et al.* agt. MOSES HENLEIN *et al.*

Fraudulent assignment—Acts of assignors which are fraudulent and render the assignment void—Creditors' action—Code of Civil Procedure, section 1871—What is a sufficient return of execution within this section with respect to judgment creditors' actions—Estoppel—What does not amount to acquiescence in, or adoption of, an assignment so as to preclude a party from suing to impeach it.

In a judgment creditor's action to set aside as fraudulent a voluntary assignment made by the judgment debtors, it appeared that the execution was returned by the deputy sheriff unsatisfied on the day on which the action was brought, though the process was not filed by the sheriff until the following day; that plaintiffs, after having discovered that shortly before the making of the assignment, and in contemplation thereof, the assignors, who were copartners in trade, had withdrawn to their own use a considerable part of the moneys of the firm, signed with other creditors an agreement of compromise, reserving the right to withdraw by a certain day; that two weeks afterwards plaintiffs obtained an attachment against defendants for fraudulent withdrawal by the latter of moneys from their assets; that plaintiffs afterwards sought to remove the assignee, and then proved their claim and delivered their proof to the assignee, annexing a statement that they did not waive their rights under the attachment or recognize the validity of the assignment, unless it should be held to be binding upon them:

Held, first, that the return of execution was sufficient within the provisions of the Code and the rule in equity with respect to the bringing of judgment creditors' actions.

Second. That plaintiffs had not by their acts acquiesced in or adopted the assignment so as to be precluded from suing to impeach it.

Third. That the assignment was void; the assignors, while professing to surrender all their property through it, having intentionally withheld a considerable part of their estate from its operation.

Special Term, July, 1885.

James Dunne, for plaintiff.

Blumensteil & Hirsch, for defendants.

VAN VORST, J.—This is a judgment creditor's action, in which it is sought to impeach as fraudulent and void, as

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against creditors, a voluntary assignment made by the judgment debtors, of all their property and effects, and which assigned property and estate the plaintiffs seek to reach in the hands of the assignee, and to have the same through a receiver appointed by the court, applied to the satisfaction of their judgment.

Upon the trial the defendants moved to dismiss the complaint upon the following grounds:

First. That the execution upon the judgment had not been returned when this action was brought.

Second. That the plaintiffs had acquiesced in and adopted the assignment, and were precluded by such conduct from maintaining an action to impeach it.

The judgment was recovered on the 26th day of November, 1884, for \$21,603.95, and on the same day an execution was issued thereon to the sheriff of the county of New York, returnable within sixty days. The deputy sheriff, Young, who had the charge of the execution, held on the same after the time limited for its return. On the 18th day of February, 1885, the deputy sheriff wrote a return on the execution in these words: "No real or personal property found," and signed his name thereto, and delivered the same to the officer in charge of the main office to be filed. On the next day, the nineteenth, the sheriff filed the execution in the county clerk's office with the return thereon indorsed by the deputy.

This action was commenced on the eighteenth day of February, the day on which the deputy sheriff indorsed his return. I think the return was sufficient within the provisions of the Code (*sec.* 1871), and the rule in equity with respect to the bringing of judgment creditor's actions. The provisions of the Code, like that of the Revised Statutes, required the return of an execution upon the judgment, wholly or partly unsatisfied, before the bringing of a creditor's action to reach equitable assets. But these statutory requirements are only an expression of the rule in equity that before the creditor could

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reach, by action, equitable assets, his remedy at law must be exhausted. The return by the sheriff of an execution unsatisfied is official evidence satisfactory to the court that the creditor has proceeded as far as he could in a court of legal cognizance to obtain satisfaction of his judgment. It is the duty of the sheriff, having made a return of his doings under an execution, to file the same in the proper office. That is implied in the command to return the same within sixty days. The word return in this last sense had more significance, when an execution proceeded from the court under its seal, for an officer to whom process is delivered for execution must, when executed, return or deliver back the same to the court issuing it, with his return thereon. "A return to process is the officer's answer touching the service or execution of such process. It is usually in the form of a certificate, and is indorsed on the writ, process or paper, and it must be signed by the officer making it" (*Crocker on Sheriffs* [2d ed.], sec. 39). It is this return which the sheriff makes that the execution is unpaid wholly or in part, and not the mere filing of the process, with which the court deals in determining whether the remedy at law has been exhausted. It is such return which may be amended if erroneous, or upon which, if false, an aggrieved party has a remedy. Thus in *Cassidy agt. Meacham* (3 Paige, 312), the chancellor said: "The creditor must set out in his bill the issuing of the execution, the time at which it was returnable, and the actual return of the sheriff thereon, in such a manner that the court can see that the remedy at law has been legally exhausted."

In *Clark agt. Dakin* (3 Barb. Ch., 36), when the execution had been filed by the sheriff in the wrong clerk's office, the chancellor held in substance that the sheriff's return upon the writ, and not the filing thereof, was the important thing, and he said "for the remedy at law is exhausted by the sheriff's return upon the execution, which is all that is necessary to give the court jurisdiction."

In the *Ocean National Bank agt. Olcott* (46 N. Y., 12, 19),

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CHURCH, C. J., says: "Although the indorsement of the execution '*nulla bona*' was not filed, it was actually made, which, with the other facts alleged, may be regarded as a substantial compliance with the equity rule referred to." (*Weinbrenner agt. Johnson*, 7 Abb. P. R. [N. S.], 202, 207.)

During the life of an execution in the sheriff's hands there is a possibility that it may be collected or paid. But in the case under consideration, when the sheriff made his return thereon, the execution was already spent. The sixty days in which a levy might have been made, upon property subject to levy, had already expired. No levy could have been thereafter made. The judgment debtors had assigned and had parted with all their property, and were insolvent. Under such circumstances, the return made by the deputy sheriff, who was charged with all duty under the process, on the eighteenth of the month, is sufficient to answer all the demands of the statute, or the rule in equity, to uphold the plaintiff's suit commenced on that day. It would be sacrificing the substance to the form to hold that the failure of the sheriff to file the execution until the following day should defeat the plaintiff's action commenced on the eighteenth day of February.

The other objection raised by the defendants' counsel is apparently more difficult. But upon examination it turns out to be a difficulty in appearance only, and not substantial. A creditor with full knowledge of fraud in fact in the execution and delivery of a voluntary assignment by a debtor of his property may elect to waive the fraud, and may acquiesce in and confirm the dispositions made thereby, and may choose to take a benefit thereunder. In such case he could not afterwards, by action in a court of equity, move in hostility to the assignment, and seek to set it aside as fraudulent against creditors. An election clearly and unequivocally made by a creditor of the assignor to sustain the assignment, and to take benefits thereunder, with knowledge on his part that it is impeachable in a court of equity for fraud, is final and

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conclusive upon the creditor. A creditor, by concurrence with or acquiescence in a voluntary settlement of real or personal estate, which was intended to hinder or delay creditors, may preclude himself from impeaching the deed (*Oliver agt. King*, 8 *De G., Mac. & G.*, 110).

In *Cavanagh agt. Morrow* (67 *How. Pr.*) I had occasion recently to apply that rule, and I dismissed the creditor's action upon the ground that he had acquiesced in and confirmed the assignment (*See, also, Rapalee agt. Stewart*, 27 *N. Y.* 313; *Pratt agt. Adams*, 7 *Paige*, 639, 641). Shortly after the execution and delivery of the assignment the books of the assignors were examined by an expert accountant at the instance of the creditors, who discovered therefrom that shortly before making the assignment, and in contemplation thereof, the assignors, who were copartners in trade, had withdrawn to their own use a considerable part of the moneys of the firm. It was not intended by them that these moneys should pass under the assignment, and they in fact never reached the hands of the assignee. At a meeting of creditors, at which the plaintiffs were present, the fact of the withdrawal of such funds by their debtors to their individual use was reported by the person who examined the books. Notwithstanding the knowledge of such facts so reported to them a proposition for the compromise of the debts of the assignors with their creditors was discussed. In the end an agreement looking to such composition was signed by several creditors, including the plaintiffs' firm. By this agreement the creditors were to receive forty cents on the dollar of their respective claims and the assigned estate was to be restored to the assignors, and the assignee discharged.

This agreement bears date the 28th December, 1883, about forty days after the assignment was made. The agreement of compromise was never carried into effect. The subsequent action of the plaintiff was in itself enough to defeat it. When they signed the agreement the plaintiffs reserved the right to withdraw unless the arrangement was consummated by a

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certain day, and before the day named they in substance withdrew. Having received nothing in pursuance of the agreement, they doubtless had the right to recede at any time before it became perfected. They certainly had such right if they had become satisfied that the conduct of the assignors was fraudulent and that the assignment itself was void or voidable for fraud.

On the 12th day of January, 1884, they clearly made an election to treat the assignment as fraudulent, for they then, upon affidavits, caused to be issued out of this court, in an action against their debtors, an attachment under which the sheriff levied upon and seized the assigned estate. Among the grounds alleged in the affidavits for the attachment was the fraudulent withdrawal of moneys by the debtors from their firm assets immediately before their assignment and in contemplation thereof.

The plaintiffs cannot be charged either with acquiescence or laches in not taking this step in hostility to the assignment immediately upon being advised at the creditors' meeting of the withdrawal of these funds by their debtors, under the circumstances above mentioned, to be used by them in perfecting a compromise with their creditors or in supporting themselves and families in the event that a compromise could not be effected.

The assignors had been advised by counsel that such withdrawal of funds was not improper, and the plaintiffs may be excused from not at once seeing in the discussion for a compromise that the withdrawal of these funds was part and parcel of a scheme on the part of the assignors to delay and defraud creditors; and in order to constitute a valid confirmation "a person must be aware that the act he is doing will have the effect of confirming an impeachable transaction" (*Leading Cases in Eq.* [*White & Tutor*, 4th ed.], vol. 1, pt. 1, p. 237), "or, in other words, of the way in which the facts would be dealt with in a court of equity" (*Idem*, p. 259). After the attachment was levied the assignee claimed the

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property, but the plaintiffs gave a bond of indemnity and the sheriff held on to the property. But the entire conduct of the plaintiffs in procuring the attachment upon the grounds alleged, which were submitted to the court, and their subsequent steps thereunder, was a pronounced election to regard the assignment as invalid, and they will be limited to an attitude of hostility hereafter (*Rodermund agt. Clark*, 46 *N. Y.*, 354; *Mollen agt. Tusca*, 87 *N. Y.*, 166). The plaintiffs' right to the attachment, upon the grounds alleged by them, has been sustained by the general term of this court (*Victor agt. Henlein*, 34 *Hun.*, 562, 565).

There are two other grounds upon which reliance is placed by the defendants' counsel to show an adoption by the plaintiffs of the assignment: one is that they moved in the court of common pleas to remove the assignee, the other that they proved their claim and delivered the proof to the assignee, both of which steps were taken after they had sued out their attachment. And if I am correct in the conclusion that the suing out of the attachment and the seizure thereunder of the assigned estate, upon the grounds alleged, was an election on the plaintiffs' part to act in hostility to the assignment, any steps in a contrary direction thereafter must fail of success.

But amongst the grounds set up in the court of common pleas upon which the removal of the assignee were sought, were the facts set up in the affidavits upon which the attachment was obtained. And in the court of common pleas the defendants' counsel distinctly urged, when the removal of the assignee was asked, that the plaintiffs were attaching creditors and could not move in that proceeding. The application to remove the assignee was not granted. Although in one aspect this movement on the plaintiffs' part might be considered as one for the preservation of the assigned estate in the hands of another assignee, yet as this estate was already "*in custodia legis*" under the plaintiffs' attachment, in hostility to the assignment, that fact of itself would have furnished a sufficient reason for the denial of the application.

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The plaintiffs, in August, 1884, proved their debt and filed the same with the assignee. But they annexed to their proof a statement that they did not thereby waive any rights they may have acquired under their attachment, and they added, "nor do we recognize in any manner the validity of said general assignment unless the same is held to be valid and binding against us."

In *Cavanagh* agt. *Morrow* (*supra*), there was an unqualified proof by the creditor of its debt and its submission. That, with other facts appearing in the case, was considered to be an act clearly in recognition of the validity of the assignment, and showing an intention to participate in its proceeds. The creditor had taken no steps adversely to the instrument.

But in the case under consideration the proof was submitted with an intentional qualification, and was only to be taken into consideration by the assignee in the event that the assignment should in the end be held to be valid. There was no admission of its validity. The assignee, cognizant of the proceedings taken by the plaintiffs in hostility to the assignment, could doubtless reject the proof and the claim (*Mullen* agt. *Tuska*, *supra*).

In *Boerum* agt. *Schenck* (41 *N. Y.*, 181, 190, 191), it appeared that the beneficiaries accepted certain moneys under a sale of premises, and with full knowledge of the facts gave a receipt therefor "on condition that it should not be deemed an affirmation of the sale, nor prejudice their right to set it aside, or their interest in the premises." The act was insisted upon as an estoppel.

The defendants' counsel makes substantially the same claim in this case. But in *Boerum* agt. *Schenck*, *WOODRUFF*, J., said: "Such a receipt has none of the characteristics of an estoppel. Such a receipt admits nothing; it misleads no one. It can work no fraud upon any person. No one of the requisites of an equitable estoppel or estoppel *in pais* can be founded on it" (*Haydock* agt. *Coope*, 53 *N. Y.*, 68).

An equitable estoppel never takes place where one party

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did not intend to mislead and the other was not misled (*Jewett agt. Miller*, 10 *N. Y.*, 402). And to create an estoppel, the conduct or representation must have been intended to influence, and must have influenced the other party to his injury (*Payne agt. Burnham*, 62 *N. Y.*, 69). For while the plaintiffs, in filing conditionally and qualifiedly proof of their debt, did not intend to commit themselves to anything inconsistent with their election and action, adversely to the assignment and the assignees right and claim to the assigned estate, their action in that regard could not and has not affected the assignee or others interested under the assignment to his or their injury. For these reasons, therefore, the motion made by the defendants' counsel at the close of the case, to dismiss the complaint, must be denied.

Upon the merits the case is completely with the plaintiffs. The assignors, professing to surrender all their property through the assignment, intentionally withheld a considerable part of their estate from its operation. They took it to themselves, to be appropriated to their own use. This was part of a plan which culminated in the assignment itself. It was not intended that these moneys should be inventoried or that the assignee should get them. That the assignee was ignorant of the withholding of these moneys by the assignors does not affect the fraudulent character of the transaction. The action of the assignors was fraudulent and their conduct vitiated the deed in equity (*Talcott agt. Hess*, 31 *Hun.*, 282; *Shultz agt. Hoagland*, 85 *N. Y.*, 464). The withholding of these moneys by the assignors has been already adjudged to have been fraudulent as to creditors (*Victor agt. Henlein, supra*). But this fraud is inseparable from the assignment itself. The facts do not justify a conclusion that the assignee took possession of the assigned estate in any true sense.

The assignors and their agents and clerks had the charge and possession, very much as before the execution of the instrument. The assignment was administered largely in the interest of the assignors, instead of the creditors.

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The facts appearing in evidence justify what VAN HORN, J., said in the court of common pleas on the motion to remove the assignee: "He (the assignee) has disregarded that provision of the statute that requires that an assignment should be accompanied and followed by an absolute change of possession of the property assigned. He not merely employed the assignors, and put them upon the pay-roll, but he left them in undisturbed possession of the goods."

There must be judgment in favor of the plaintiffs decreeing the assignment to be fraudulent and void, as having been made with intent to hinder, delay and defraud them, and that the same be set aside.

SUPREME COURT.

LIZZIE PAYN agt. THE MUTUAL RELIEF SOCIETY OF
ROCHESTER, New York.

Mutual benefit association — When member does not forfeit his claim for benefit by failure to pay assessment or failure to serve proofs of death.

When the by-laws of a mutual benefit association provided that, "If any member shall neglect to pay his annual dues or assessments to the general secretary or to the secretary of the local board, *within thirty days from the date of a notice to pay the same by the general secretary, he shall forfeit all claims on the society, until reinstated*, as provided in the next section:"

Held, that the forfeiture is only incurred by the failure for "thirty days" to pay on a notice given "by the general secretary."

A notice given by the local secretary cannot be deemed one "by the general secretary; nor are cards issued in the name of the general secretary, to which his signature is appended in print, and which the local secretary has filled up and addressed, in any sense a notice "by the general secretary."

A notice to do an act, which is required to be given by a particular person named contemplates the personal action and judgment of the person authorized to give such notice, and involves the exercise of power and discretion to be exercised by the individual himself which he cannot delegate to another.

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Where on the death of a member application was made to the proper officer for the necessary blanks to furnish proof of death, which were refused on the ground that such member did not pay a certain assessment and the officer did not consider he was a member:

Held, that this was a waiver of proof and notice of death.

Albany Circuit, January, 1885.

James C. Matthews, for plaintiff.

J. M. Dunning and *H. G. Prindle*, for defendant.

WESTBROOK, J.—It is conceded that the plaintiff in her own right as the widow of Benjamin F. Payn, deceased, and as the guardian *ad litem* of the infant son of herself and her deceased husband, is entitled to recover \$2,000 from the defendant on account of her husband's death, unless her action is barred, first, by the failure of the husband to pay an assessment during his lifetime to the defendant; or, second, by the failure to serve proofs of death upon the defendant. The two points will be briefly considered:

First. Does the action fail by reason of the neglect of the deceased to pay dues to the defendant?

The deceased was taken ill on the 3d day of July, 1881, and died August 22, 1881. The claim of the defense is that on the 1st day of July, 1881, the deceased had notice of an assessment which he failed to pay, and in consequence of such failure to pay he forfeited all claims upon the defendant.

There are two answers to this defense: 1st. The defendant alleges that there was a local board of the defendant at Albany where the deceased resided, which had a local secretary as provided for by article seven of its by-laws. It was this local secretary who, as the defendant claims, gave to the deceased the notice of the assessment on July 1, 1881, by depositing the same in the Albany post-office. It is true that by section 2 of article 7 members of the local board were required to pay all assessments and annual dues to the local secretary. It is also true that the section referred to provides that "said secretary

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shall serve notice of such assessments and dues upon members of the local board personally *or by mail*, and collect such assessments and dues within the time specified in such notices that they become due;" but it is nowhere declared in the by-laws of the defendant that a member forfeits his rights on a failure to comply with that notice by a local secretary. It is simply made the duty of such local secretary to "*collect such assessments and dues within the time specified in such notices that they become due.*" Not a word is said about the forfeiture of rights as a member on the giving of any such notice. On the contrary, by section 7 of article 4 of such by-laws, it is declared and specified in what cases a failure to pay dues and assessments makes a forfeiture. The section reads thus: "If any member shall neglect to pay his annual dues or assessments to the general secretary or to the secretary of the local board, *within thirty days from the date of a notice to pay the same by the general secretary, he shall forfeit all claims on the society until reinstated, as provided in the next section.*" It will be observed that the propriety of the payment either "to the general secretary or to the secretary of his local board" is recognized; but the forfeiture is incurred by the failure for "*thirty days*" to pay on a notice given "by the general secretary." The definiteness of the language of the section just quoted, in which the "general secretary" and the "local secretary" are both mentioned, but the forfeiture made to depend on a failure for "*thirty days*" to comply with a notice to pay given "by the general secretary;" and also the simple authority for the "local secretary" to collect an assessment of which he has given notice within the time he prescribes in such notice, without the declaration of any forfeiture, forbid that the language used is to have any other construction than its plain terms involve. Even though, however, there was an intent by the defendant, in the preparation of its by-laws to give to the notice of the local secretary the same effect as that of the general secretary, it has entirely failed to express such intent in words. The right to forfeit the membership of the

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deceased on account of the non-payment of a small assessment levied during a severe and fatal illness must be strictly pursued, and words are not to be enlarged for the purpose of defeating a claim of a widow and a minor child to a small pittance, which a deceased husband and father supposed he had made for their benefit. Neither can such a notice as the defendant claims was given by the local secretary be deemed one "by the general secretary." Cards issued in the name of the general secretary, to which his signature is appended in print, and which the local secretary has filled up and addressed, are in no sense a notice "by the general secretary." A notice to do an act, which is required to be given by a particular person named, contemplates the personal action and judgment of the person authorized to give such notice, and involves the exercise of power and discretion to be exerted by the individual himself which he cannot delegate to another. 2d. I decline to find as a fact that Dr. Nellis mailed the assessment notice as testified to by him. He remembers that he *intended* so to do, and that he actually did direct and mail a notice to each of his local members as he *supposes*, but he has no recollection of the one to the deceased. He who knows how mechanically we sometimes do that which we intend to do, and how often we are mistaken in what we suppose we have done, will in view of the non-reception of the notice by the deceased, question the doing of the act by the witness, which he *believes* he did, but which he does not *remember* to have done. Without giving all the evidence in full, the great pains which were taken by the deceased and his friends to pay his dues, in view of the fact that the dangerous and probably fatal character of his illness was known, and the non-delivery or reception of the notice induces me to find as a fact that it was not sent by mail as the local secretary supposed it was.

Second. As to the alleged failure to give proof of death, the facts bring this case within the rule established in *Grattan* agt. *The Metropolitan Life Insurance Company* (80 N. Y., 281).

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Application was made to Dr. Nellis, the local secretary, for the necessary blanks to furnish proof of death, and the brother of the deceased who made the application testified, and he is entirely uncontradicted, as follows: "He said he couldn't furnish me a proof because he did not pay his July card, and he considered he was not a member." This, according to the case referred to, was a waiver of proof and notice of death; and in reason and common sense the defendant who refused to furnish a person with the necessary blank form to make proof of a fact, which it had the right to insist upon, upon the ground that the dead person was not one of its members, has no right now to say to the widow and child, when the membership of the husband and father is established, "Yes, your husband and father was a member, but you failed to give us proof of his death." It must in its defense stand upon the same ground it then took, and which it also took in a more formal manner by written notice to the plaintiff's representative, that the deceased had forfeited his membership in the defendant with its privileges by his failure to pay the assessment of July, 1881.

The plaintiff is entitled to judgment for the sum of \$2,000 with interest from the date which the certificate of membership issued by the defendant to her deceased husband, shall, according to the legal effect require, with costs of the action.

The findings will be settled on notice.

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SUPREME COURT.

In the Matter of the Petition of the NEW YORK, LACKAWANNA AND WESTERN RAILWAY COMPANY for the appointment of commissioners to appraise certain lands of HARRIET A. BENNETT *et al.*

Railroads — Commissioners to appraise lands for railroad purposes — When guilty of misconduct — Power of court to remove on motion — Proper case for the exercise of such power.

A railroad company, being desirous of acquiring for railroad purposes certain land owned by B., entered into a written agreement with B. by which she agreed, upon the payment of the full purchase-price, to convey to said company the premises. With a view of ascertaining the value of said premises and the compensation which should be paid therefor the railroad company agreed to institute proceedings under the general railroad laws for the condemnation of lands for railroad purposes; and it was further provided in said agreement that in said proceedings H. D. and C. should be appointed commissioners to ascertain and determine the compensation to be paid, and the decision of a majority of them should be binding upon both parties, it being also agreed that said commissioners should be governed in estimating the said valuation by the rules of law applicable to proceedings under said statute (except as they may be modified by this agreement), and that all the rights of appeal given by law shall be reserved to either party. An order was obtained by the railroad company at special term appointing said persons commissioners. They entered upon their duties, and after viewing the premises and hearing proofs made a report. The railroad company not being satisfied with the report and award refused to move for confirmation, and the owner moved and obtained an order at special term confirming the report and appraisal. On appeal by the railroad company the appraisal and report were set aside by the general term on the ground of the admission by the commissioners of improper evidence. The hearing again came on before the commissioners, who, notwithstanding the objection of the railroad company, received the same objectionable evidence, the receipt of which on the first hearing was the cause of the reversal of their report, and two of the commissioners, "D." and "C.," publicly stated that they did not consider themselves bound by the supreme court decision. After the hearing had proceeded so far that the owner had introduced her evidence, the railroad company not

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having introduced its evidence, moved to vacate the order appointing the commissioners:

Held, first, that commissioners "D." and "C." have been guilty of misconduct, such as is cause for their removal.

Second. That the court on this motion has power to remove them.

Third. That this is a proper case to exercise such power notwithstanding the contract existing between the parties.

Erie Special Term, July, 1885.

THIS is a motion by the petitioner, the railroad company, for an order vacating and setting aside an order made by this court October 25, 1883, appointing commissioners to appraise lands for railroad purposes on the ground of the misconduct of two of the commissioners.

Rogers, Locke & Milburn (S. S. Rogers, of counsel), for motion.

Sprague, Morey & Sprague (George F. Comstock, of counsel), opposed.

LEWIS, J. — The petitioner, being desirous of acquiring for railroad purposes a lot of land owned by Mrs. Bennett, in the city of Buffalo, 171½ feet front on Buffalo river and about 120 feet in depth to Joy street, upon which was an elevator, entered into a written agreement with Mrs. Bennett, by the terms of which she agreed, upon the payment of the full purchase-price, to convey to petitioner, with covenants of seizin and quiet enjoyment, a perfect title to said premises, with exceptions not material to be here mentioned. It also provided for a conveyance by Mrs. Bennett of other rights and interests in contiguous property.

With a view of ascertaining the value of said premises and the compensation which should be paid therefor, the petitioner agreed to institute proceedings under the general railroad laws for the condemnation of lands for railroad purposes; and it further provided as follows: "It is agreed that in said proceedings Nelson K. Hopkins, Robert Dunbar and

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Brigham Clark shall be appointed commissioners to ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in said property, and the decision of a majority of them shall be binding upon both parties as the decision of all. It being understood and agreed, however, by both parties to this instrument that said commissioners shall be governed in estimating the said valuation and compensation by the rules of law applicable to proceedings under said statutes (except as they may be modified by this agreement), and that all the rights of appeal given by law shall be reserved to either party."

The petitioner agreed to pay to Mrs. Bennett on execution of the agreement \$2,250; \$20,000 within ten days thereafter and the balance of the sum awarded within thirty days after the final determination, and to make some railroad connections with another elevator belonging to Mrs. Bennett.

The petitioner obtained an order at special term appointing said persons commissioners. They entered upon the discharge of their duties. After viewing the premises and hearing the proofs they made a report awarding as compensation to be paid for the property \$469,375. The petitioner not being satisfied with the amount awarded refused to move for a confirmation of the report. The owner thereupon applied to the special term of this court for and obtained an order confirming the report and appraisal. Petitioner brought an appeal and the appraisal and report were set aside by the general term on the ground of the admission by the commissioners of improper evidence. The hearing again came on before the commissioners; claimant offered, and the commissioners, notwithstanding the objection of the petitioner, received the same objectionable evidence, the receipt of which upon the first hearing was the cause of the reversal of their report. Two of the commissioners, Messrs. Dunbar and Clark, while the commissioners were in session upon the second hearing, publicly stated that they did not consider themselves bound by the supreme court decisions, but they

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considered themselves bound and sworn to ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the property, and to do justice between the parties, and as much justice to the railroad company as to Mr. Bennett, as far as they knew." The hearing has proceeded so far that the owner has introduced her evidence. The petitioner has not introduced its evidence and now moves to vacate the order appointing the commissioners. The questions for consideration are:

First. Have Messrs. Dunbar and Clark been guilty of misconduct such as is cause for their removal?

Second. Has the court on this motion the power to remove them?

Third. If it has, is this a proper case to exercise such power, in view of the contract existing between the parties?

In disposing of these questions I shall confine myself to the conduct of the commissioners in receiving the evidence held by the general term to be illegal and incompetent, and their avowal that they do not consider themselves bound by the decision of the general term. Taking this statement in connection with their acts in receiving the evidence, it amounts to a declaration on their part that they understand the full import of the decision of the general term, and have made up their minds not to conform their conduct on the trial to it; they have intentionally and deliberately admitted evidence that the superior tribunal held to be incompetent and illegal. Is it their duty to follow the decision of the general term? It is the universal practice of the judge at special term and circuit, where the general term has decided the case, to follow the law as laid down by that court. Should he fail so to do it would lead to confusion, and the case could not be brought to a conclusion, as it would continue to vibrate between the two courts. It is clearly the duty of the justice at special term or circuit, when the general term has made a decision of the case, to accept its decision as the true exposition of the

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law of that case, and follow it, whatever may be his individual opinion as to its correctness; and should he persistently refuse so to do, he would be guilty of misconduct in office. He may be able to find conflicting decisions upon the question, but it is sufficient for him that the law has been laid down by the appellate court (*Adams* agt. *Bush*, 2 *Abb. [N. S.]*, 112; *Greenbaum* agt. *Stein*, 2 *Daly*, 223; *Rochester and G. V. R. Co.*, agt. *Clarke Nat. Bank*, 60 *Barb.*, 234; *Jones* agt. *N. Y. and Erie R. Co.*, 29 *Barb.*, 633, 636; *Head* agt. *Smith*, 44 *How.*, 476; *Cooper* agt. *Smith*, 43 *Supr. Ct.*, 9).

If the law laid down by the general term and followed by the judge at special term and circuit is not sound, the remedy of the aggrieved party is either an appeal to the court of appeals or a motion for reargument.

Does this same rule apply to these commissioners? While they are the persons agreed upon as commissioners, by the parties, they were appointed by the court; the contract provides that they shall be governed, in estimating the valuation and compensation (and that is substantially all the duty they have to perform) by the rules of law applicable to proceedings under the statutes, referring to the laws for the condemnation of lands for railroad purposes, "except as they may be modified by the agreement." The general term has held that notwithstanding the clause in the contract last mentioned, the commissioners erred in admitting evidence.

The agreement provides that "all the rights of appeal given by law shall be preserved to the parties." One of the rights of appeal in such proceedings is to seek a reversal of the report on account of the admission of improper evidence. If the commissioners can upon a retrial admit the same illegal evidence, the provision giving the right of an appeal to the parties, instead of being a right reserved, becomes an injury to the party aggrieved, for an appeal adds to his expense and avails him nothing. This right of appeal must have been inserted in the contract for some effectual purpose, and one object was that the errors of the commissioners might be cor-

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rected. The court has put its construction upon the contract, decided that the commissioners had taken an erroneous view of its meaning, and had erred in the admission of evidence; that decision becomes, by virtue of the agreement itself, a part thereof and is binding upon the parties. When parties enter into a contract they practically agree that they will, in carrying out its provisions, conform to the decision of the courts. In case controversies arise, they are at liberty to invoke the judgment of the highest tribunal the law has provided for the decision of their disputes; but when that tribunal has spoken, they must obey. The highest tribunal the law has provided to decide questions involved in this proceeding, touching the admission of evidence, has interpreted the contract and decided upon the course the inferior tribunal shall pursue in the discharge of its duties. Having so spoken, they must observe the decision as a part of the contract. Had the agreement provided that no appeal should be taken from the award of the commissioners, they would not be bound by the strict rules of evidence, but could decide according to their sense of equity (62 *N. Y.*, 392).

In such a submission the parties submit their controversies, saying to the arbitrators, "you shall not be amenable to a higher tribunal; we submit all our differences to you; do what you think is just in the premises; we will not appeal." But this agreement provides very differently, it says that each party may have the advantage of an adjudication of the appellate court. While this is conceded by claimants' counsel, they insist that as there is no appeal from the second award, the commissioners are not now amenable to any appellate tribunal, and therefore can do as they please as to following the decision of the general term. I am not satisfied that this position is correct, and cannot bring my mind to the conclusion that such is the import and meaning of the contract.

Is the refusal of the commissioners to follow the general term, misconduct, or mere error of judgment? The general term say in their opinion, referring to the class of evidence

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admitted by the commissioners upon the first hearing, "the reference made to the earnings of other elevators with a view of proving the income of the property in question after its capacity is increased by the expenditure of the necessary amount for that purpose, is not a reliable or approved basis for estimate of value, but it becomes a matter of speculation depending upon too many circumstances to be entitled to consideration as evidence of value; and the same may be said of the contemplated relation to and operation of other property, and projects in view for connecting facilities for channels of transportation not in the control of the owner of the property in question. * * * And when an attempt is made to found an estimate of value based upon income upon those conditions, too many contingencies intervene to make such opinions evidence, or to furnish any legitimate aid to the tribunal required to determine the value of property. It cannot be seen that this character of testimony did not have its influence on the commissioners, if it did not control their action in reaching a result. * * * In view of all the testimony it is difficult to escape the conclusion that the commission reached their result by the application of erroneous principles to the appraisal of value of the property in question, and that the amount of compensation awarded by their report was by that means increased considerably in excess of the fair market value of the property." The court held, that the admission of such evidence was error and set aside the award for that reason; and yet upon the second hearing the commissioners ignore this decision, expose their minds to the influence of this illegal evidence, and avow that it is done intentionally, and that they are not bound to follow the general term decisions. If this is simply an error of judgment, it is an error so palpable and material as to amount in law to misconduct. It is saying, in unmistakable language, "we will not investigate questions submitted to us in conformity to legal proceedings. We will not, in administering the law, conform to the law." If this be simply error of judgment, the

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probable consequences are so serious and disastrous that they should be averted if possible.

Has the court power on this motion to vacate the order made appointing these commissioners and thereby in effect remove them? While these commissioners are not arbitrators, the decisions of the courts in matters of arbitration may aid us in determining the questions involved in this motion.

Where an arbitrator has proceeded upon a gross and palpable mistake of law affecting the merits the court will grant relief (45 *How. Pr.*, 462). "If an arbitrator unreasonably refuses to hear a competent witness it is gross misconduct, for such refusal is against natural justice. If the whole cause be referred back to him by the court, his refusal to admit additional evidence is fatal. If an arbitrator, contrary to express directions, receives affidavits instead of oral testimony, it is misconduct which will invalidate his decision" (*Morse on Arbitration and Award*, 536, and cases there referred to). If arbitrators are guilty of misconduct in refusing to receive proper evidence or other misbehavior affecting the rights of a party, the court may set aside their award upon motion (*Smith agt. Cutler*, 10 *Wend.*, 589; *Walker agt. Frobister*, 6 *Vesey*, 70; *Matter of Application of Mayor of New York*, 49 *N. Y.*, 150; *Matter of Prospect Park and C. I. R. R. Co.*, 85 *N. Y.*, 489). If the court can set aside an award on motion, why not remove an arbitrator for good cause before he makes his award? The opinion of the general term in this case says: "The court in the first instance might have refused to appoint these persons as commissioners, and may yet revoke the order of their appointment." Judge EARL, in the opinion in the court of appeals in this case, says: It is undoubtedly true that the court at special term was not bound to appoint the three commissioners named by the parties. It could have refused to appoint them and have left the parties either to abandon their agreement or to carry it out in some other way." If the court at special term could refuse to appoint the persons commissioners named in the contract,

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why, after having so made the order, may it not set it aside? If Messrs. Dunbar and Clark had appeared in court when the motion was made for their appointment and announced that if appointed they would follow their own notions as to the admission of evidence and would not be guided by the decision of the court in the case, I assume the court would have refused to make the order it did. Having now learned that the commissioners so appointed do assume that position, is it not in the power of the court to cancel its order?

In the Matter of the Application of the Prospect Park and Coney Island Railroad Company to acquire title to land (85 N. Y., 496) the court says: "If the landowners in such case claimed that there was any irregularity, fraud or mistake in the proceedings of the commissioners, or back of such proceedings, their remedy is by motion to set the award and proceedings aside, and not by appeal from the award or the order confirming the same."

Judge FOLGER says, *In the Matter of the Application of The New York Central and Hudson River Railroad Company for the appointment of commissioners to appraise lands of Alexander Cunningham and others* (64 N. Y., 64): "The court had the power to revoke the appointment of the first commissioners for good cause shown; and it also had the power to set aside the confirmation of their report, for good cause shown, and to reject it."

Does the contract stand in the way of granting this order? It is contended by the landowner that changes have occurred in the property and its surroundings since the making of this contract, and that losses will follow to her if the order appointing the commissioners be vacated. It is not claimed that the possession of the owner in the property has been disturbed. The contract very carefully provides that no right or interest of Mrs. Bennett shall in any manner be interfered with or distributed until the entire purchase-price is paid. The prosecution of the suits therein mentioned is not interfered with. The owner is at liberty, so far as the contract provides,

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to prosecute her actions with diligence. If she has parted with anything or been less diligent, it is not because she was bound so to do by the contract. If the refusal of the commissioners to follow a general term decision be misconduct, and the cause for vacating the order appointing them, and vacating the order destroys the contract and deprives the landowner of the benefit of its provisions, she is a party to the causes producing that result. The admission of the illegal evidence was deliberately urged by her counsel upon the commissioners. The same consequences to the contract would result should one of the commissioners die or in any way become disabled so as not to be able to proceed in the matter.

It is contended that this motion is premature; that it is not yet known that any one is to be injured by the award of the commissioners. It is, however, now known that two of the commissioners refuse to conduct the proceeding in a lawful manner. The petitioner is now aware of this; can it wait until the award is made and then complain? Will it not then be said: "You are too late with your complaints. You were informed during the trial upon what rules and principles a majority of the commissioners were proceeding, and you were not at liberty to remain silent; take your chances of obtaining a favorable award, and then complain. You should have refused at once any longer to be a party to the proceedings, knowing that errors could not be corrected by an appeal." If a party is made aware, during the trial, of misconduct of a juror, and fail to complain until after verdict, it is then too late.

In *Faviell agt. Railway Company* (2 *Exch. R.*, 344), baron ALDERSON, said: "Where the defendant saw the arbitrator entertaining a question which he ought not to entertain, it was his duty to interpose and apply to the judge for the purpose of being allowed to revoke the submission which no doubt would have been granted had it appeared by affidavit that the arbitrator intended to exceed his jurisdiction. Instead of doing that, the defendants, although they find the arbitrator

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going on, do not interpose but make the question one for his determination, and he has determined it" (*See Morse on Arbitration and Award*, 104, 105; *Fox* agt. *Hazeltine*, 10 *Pick.*, 275; *Brown* agt. *Leavitt*, 26 *Maine*, 251; *Hiltown Road*, 18 *Penn. St.*, 233; *Christman* agt. *Moran*, 9 *id.*, 487). The case of *Malmesbury Railroad Company* agt. *Budd* (2 *Ch. Div.*, 113), was a motion in an equity action to have it declared that an arbitrator had become and was disqualified from and incapable of being or acting as arbitrator under an indenture, and for an injunction restraining him from acting. Sir George Jessel, master of the rolls, in his decision said: "No doubt there is jurisdiction in the court to set aside an award on the ground of the corruption of the arbitrator, but if the corruption is proved beforehand so that the arbitrator is unfit to sit, it appears to me that by analogy to the writ of prohibition which goes to inferior courts to prevent a judge, who is incompetent, from deciding a case, there must be a similar jurisdiction to prevent the throwing away of the expense and trouble, to say nothing of the delay involved in going on with an arbitration before an arbitrator, who has no power of deciding the case."

In *Beddow* agt. *Beddow* (9 *Ch. Div.*, 89), the same judge granted an injunction to restrain an arbitrator who had become unfit by reason of personal misconduct from hearing the case.

These cases are authority for the removal of arbitrators before they make an award. It is true the orders were granted in equity actions brought for that purpose. While I have not found a precedent for the granting of just such a motion as this, there are many precedents, as we have seen, for setting aside awards on motion. This is a proceeding in this court. The order sought to be vacated was made by this court, and, as was stated by justice CLERKE in the case of *Lower* agt. *The Mayor, &c., of New York* (5 *Abb. Pr.*, 487), "it belongs to the essential inherent powers of this court to exercise such an efficient control over every proceeding in an action pending in it as effectually to protect every person

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actually interested in the result from injustice and fraud, and that it will not allow itself to be made the instrument of wrong no less on account of its detestation of everything conducing to wrong, than on account of that regard which it is proper it should entertain for its own character and dignity." Not finding an exact precedent for this motion, my mind came to the conclusion that this order should be granted with reluctance and some misgivings as to its correctness. I am relieved, however, by the consciousness that if my conclusion is erroneous, an easy and speedy remedy is provided to correct my error. I have, in deciding this motion, assumed that the general term laid down the law correctly in this case, and believing it to be the duty of the commissioners to conform their conduct in the admission of evidence to the principles therein contained, and they having refused so to do, and this court having granted the order appointing them to the responsible position they hold, it is my duty to set aside the order and leave the parties to agree upon new commissioners or pursue such other course as they may be advised. I put this decision solely upon the ground above stated. Charges are made in the moving papers against one of the commissioners, touching some business transactions between himself, as a member of a firm, and Mrs. Bennett. These transactions all occurred after making of the award and at a time when it was not known that he would be required again to act in the proceedings, but without regard to the time of their occurrence. The affidavits read in opposition to the motion, fully and satisfactorily explain these transactions and remove any suspicion of impropriety on the part of the commissioner.

The order granted by this court on the 25th day of October, 1883, appointing N. K. Hopkins, Brigham Clark and Robert Dunbar commissioners in this proceeding, should be vacated and set aside, and the commissioners removed.

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CITY COURT OF NEW YORK.

CHARLES NEGLEY agt. THE COUNTING-ROOM COMPANY.

Practice—On opening defaults when the judgment is allowed to stand as security—Effect of the lien.

Where a judgment by default is opened on condition that the lien of the judgment shall stand as security, the plaintiff, if he finally succeeds, must enter a new judgment by filing a fresh roll containing all the papers in the case, the same as if no former roll had been filed. The order opening the default in legal effect modifies the judgment by depriving it of its ordinary character as a *res adjudicata*, but leaves it in full force as a lien or collateral security. If the plaintiff fails in the action the security is returned by canceling the collateral judgment, which loses its legal vitality and effect when the action fails. But if the plaintiff succeeds the security judgment is not impaired, but may be enforced, if necessary, by the plaintiff in aid of the final judgment. In case of appeal the trial or final judgment is the one to be appealed from, and no reference need be made to the security judgment.

Special Term, August, 1885.

McADAM, C. J. — Judgment was taken against the defendant by default. It was subsequently, upon motion, so far opened as to permit the defendant to come in and defend upon the merits, the judgment in the meantime to stand as security. The action was afterwards tried and a verdict was rendered in favor of the plaintiff, on which he entered a fresh judgment for the amount of the recovery, with costs, as taxed. The defendant insists that this practice is irregular as there cannot be two judgments for the same debt. But the claim is without force or merit, as the first judgment is merely collateral to the other and security only for its payment.

In *Hall agt. Templeton* (4 *Weekly Dig.*, 120) this court held that where a judgment by default is opened on condition that the lien of the judgment shall remain as security, the plaintiff, if he finally succeeds, must enter a new judgment by filing a fresh roll containing all the papers in the case, the same as if

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no former roll had been filed, and that in case of appeal the trial or final judgment is the one to be appealed from, and no reference need be made to the security judgment. This decision accords with the ruling made in *Mott agt. The Union Bank* (8 Bosw., 591; *affirmed*, 38 N. Y., 18).

The order opening the default in legal effect modifies the judgment by depriving it of its ordinary character as a *res adjudicata*, but leaves it in force as a lien or collateral security (38 N. Y., at p. 20). Until the final determination of the controversy no execution can be issued on the security judgment to enforce its payment (*Ford agt. Whitridge*, 9 Abb. Pr., 416). The right to continue the lien of the judgment results from the general power which the court has to regulate its judgments, and from section 724 of the Code, which provides that "the court may upon such terms as justice requires" relieve a party from a judgment taken against him by default through inadvertence. Under this authority the lien of the judgment opened may, as one of the conditions upon which it is opened, be retained by way of security (2 Johns. Cases, 286; 6 Cow., 390; 7 *id.*, 477; 9 How. Pr., 442; 35 Hun, 637).

If the plaintiff fails in his action the security is returned by canceling the collateral judgment, which loses its vitality and effect when the action fails. But if the plaintiff finally succeeds in the action the orderly practice is to issue an execution upon the final judgment, which is the real judgment in the case, and if that proves unproductive then to pursue whatever lien the collateral judgment gives; or if a levy has already been made on the collateral judgment, or a proceeding has been founded thereon, and either has been preserved by the order opening the default, it will not be impaired, but may be enforced if the plaintiff finally recovers in the action. But the court, in controlling the execution of its own process, may no doubt, on application, direct the manner of its enforcement so that the rights of all parties may be preserved and enforced without injury or oppression to either. It is clear, therefore,

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that the security judgment is to remain of record unimpaired until the judgment entered upon the verdict has been paid, reversed, or in some legal form removed from the judgment docket.

N. Y. COMMON PLEAS.

JULIA H. EARLY agt. MAURICE E. EARLY.

Referee's fees in divorce suits — Who to pay.

In an action for divorce on the ground of alleged cruelty, brought by a wife against her husband, even where the wife prevails, the defendant, the husband, will be compelled to take up the report and pay the referee's fees.

Special Term, August, 1885.

THE plaintiff brought a suit in January last against her husband for limited divorce on the ground of alleged cruelty. The parties were married in this city on May 10, 1879. The case was sent before a referee, whose bill amounts to \$150. This sum the defendant alleges his inability to pay, as well as denying the charges brought against him.

VAN HOESSEN, J. — There is but one course to pursue in this matter, and that is to require the defendant to take up the referee's report. That report may or may not be confirmed. The plaintiff may or may not prevail in the action. But the court has ordered a reference for the purpose of informing its conscience. The conduct of that reference has involved a bill for referee's fees. Who is to pay them? The referee is the officer of the court and must be paid. The party prevailing would under ordinary circumstances advance them. But that party is the wife, who is without means save such as the husband may provide. Except where it is apparent that the wife's case is without merit, it is the practice of the court to compel the husband to furnish to the wife the means of

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carrying on her suit. It is said that in this action the wife cannot succeed. As to that I have no opinion to express, but the orderly course of business is to bring before the court the testimony that has been taken, together with the report of the referee. In order to do that the fees of the referee should be paid. The judge who examines the report and the testimony will determine whether or not alimony should be allowed. But as a preliminary to obtaining that determination I must order the defendant to pay the fees of the referee. Of course only the legal fees need be paid. Let the proper order be prepared and left with Mr. Jarvis, the clerk, for transmission to me.

SUPREME COURT.

In the Matter of RAMON CAAMANO, an imprisoned debtor.

Imprisoned debtor — Discharge from arrest under the insolvent law — When granted — That defendant converted money received in a fiduciary capacity, does not prevent his discharge.

Where the petitioner was arrested for converting to his own use moneys and securities belonging to the plaintiff, while acting in a fiduciary capacity, and was imprisoned in default of bail, and on his application for a discharge his examination showed that in violation of his trust he had used the money and property for his own benefit:

Held, that he was entitled to his discharge, because it did not appear that he had disposed or made over any part of his *own* property, with a view to the future benefit of himself or his family, or with intent to injure or defraud any of his creditors.

Special Term, August, 1885.

ANDREWS, J. — After a careful examination of this case I have reluctantly come to the conclusion that the application for the discharge of the petitioner must be granted. There is no dispute about the facts upon which the order of arrest was obtained. Caamano, having in his possession a large

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sum of money belonging to Mrs. Roderiguez, who resided in Spain, used the same for his own purposes, and then, under a power of attorney which he held, raised \$40,000 more by mortgaging Mrs. Roderiguez's real estate, which was situated in New York, and used this sum in the same manner. The latter transaction was so deliberately planned, and so carefully and coolly carried out, as to leave no possible doubt that he is a man who hesitates at nothing to accomplish his purposes. He has no possible claim upon the sympathy or tender consideration of the court, and did the law permit it would be but justice that he should be imprisoned for a long term of years. He must, however, be accorded the rights secured to him by the laws of this state, and I am of the opinion that, upon complying with the provisions of the Code, he must be discharged.

In *Sugdam agt. Belknap* (20 Hun, 87), which was an application like this, the petitioner was arrested for converting to his own use moneys and securities belonging to the plaintiff while acting in a fiduciary capacity and was imprisoned in default of \$35,000 bail. He applied for a discharge, and his examination showed that in violation of his trust he had used the money and property for his own benefit. It was, nevertheless, held by Mr. justice WESTBROOK that he was entitled to his discharge, because it did not appear that he had disposed or made over any part of his own property with a view to the future benefit of himself or his family, or with intent to injure or defraud any of his creditors. On appeal the order for the discharge was affirmed. The court at general term said: "This case is distinguishable from that *In re Brady* (69 N. Y., 215), because the charge is that the defendant received money in a fiduciary capacity for which he has not accounted. The defendant Brady was charged with a disposition of his property with the intention of defrauding his creditors, and for that reason it was held that his proceedings were not just and fair. This case does not show any appropriation of this kind, and therefore that he has property

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attainable by recourse to his grantee or otherwise. The money received was disposed of by him, and though improperly used does not subject him to the rule established by the case referred to. We cannot say under the circumstances that his proceedings have not been just and fair."

It seems to me that this case is decisive of the present application. With regard to the first money appropriated by Caamano the cases are identical. With regard to the \$40,000, the learned counsel for the plaintiff claims that the decision in *Suydam* agt. *Belknap*, is not applicable, because the money was obtained through a mortgage, and when it came into Caamano's possession was to be regarded as his money, and that he has therefore disposed of his own money with intent to defraud his creditors, or for the future benefit of himself or members of his family.

I am not able to concur in this view. From a moral standpoint Caamano's conduct in raising money by mortgaging his principal's property, and then appropriating it to his own use, was, if possible, more infamous than in so appropriating moneys which had lawfully come into his possession, for in the former case he committed a double crime. This, however, does not change the legal aspect of the matter. The \$40,000 was not in the eye of the law his money, but that of Mrs. Roderiguez, and when he appropriated it he was disposing of her money and not his own. So far as this application is concerned the \$40,000 must be regarded as money which, though obtained by a previous fraud, was held by Caamano in a fiduciary character, and upon a trust, which the law would imply to pay it over to Mrs. Roderiguez, whose property had been incumbered to raise it. Viewed in this light, the decision in *Suydam* agt. *Belknap*, is just as applicable to the \$40,000 as to the moneys previously appropriated, and I am constrained by it to hold that Caamano is entitled to his discharge.

The distinction between cases like the present one and that presented in *Matter of Brady* (69 N. Y., 216), is pointed

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out in the opinion of the general term. In the latter case the petitioner had disposed of his own property with intent to defraud the creditors who opposed his discharge, and the affidavit required by the statute that he he had not done so was therefore untrue, and his proceedings were held not to be just and fair. It may well be, as was held in *In the Matter of Roberts* (59 How., 136), that it is worse for the debtor to dispose of the creditor's property than for him to dispose of his own, and that the former act as well as the latter ought to prevent his discharge. It is not, however, so provided in the statute, and the views of the learned judge who decided the *Roberts case* were expressly disapproved by the general term of the court of common pleas (*In re Fowler*, 8 Daly, 85). Counsel for the plaintiff also calls attention to the fact that portions of the fund with which the \$40,000 was mingled were given by Caamano to his wife, his brother and brother-in-law, and claims that his conduct "does not make it a violent supposition that he purposely turned over a large part of Mrs. Roderiguez's property for the future benefit of himself and various members of his family.

Of course, if he had disposed of Mrs. Roderiguez's property in this manner, he could not be discharged. The burden of proof, however, to show such disposition of her property is on the plaintiff (*In the Matter of Benson*, 10 Daly, 166). Not only is such disposition not shown by the plaintiff, but the examination of the debtor, which stands uncontradicted, establishes the contrary. The testimony is that the real estate conveyed to his wife was inherited by her from her mother, and a satisfactory explanation is given why the title was taken in Caamano's name and of the subsequent conveyance. The testimony is also to the effect that the payments to his relatives were for full consideration out of moneys that belonged to them. There is no evidence that Caamano disposed of his own property or that of Mrs. Roderiguez for the future benefit of himself or members of his family, or with intent to defraud his creditors, and an order must be granted directing him to

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execute an assignment to a trustee, and that he be discharged upon complying with the provisions of the Code relating to the assignment and delivery of his property.

SUPREME COURT.

MARY C. JENKINS, as administratrix, &c., of DANIEL JENKINS, deceased, agt. THE CITY OF HUDSON.

Jury — Effect upon a verdict when the entire jury is unsworn and no objection made — Code of Civil Procedure, sections 721, 1016, 1166.

If a trial proceeds, and a verdict be rendered without a jury being sworn, such a verdict is not irregular and void, when neither party asked that the oath should be administered.

That which the law requires to be done for the protection of a party, may be waived, and the failure to object is a waiver. Nor can failure to object be excused by alleged ignorance.

Ulster Special Term, May, 1885.

MOTION to set aside the verdict of a jury for irregularity.

C. A. Baurhyte and C. P. Collier, for defendant and motion.

Andrews & Edwards, for plaintiff and opposed.

WESTBROOK, J. — In this case the plaintiff, whose husband was killed by the upsetting of a load of hay in the city of Hudson, recovered a verdict for \$2,500 against the city in an action tried at the Columbia circuit, in April, 1885, for negligently causing such death by permitting one of its streets, upon which the deceased was traveling at the time of the accident, to be out of repair.

The defendant now moves, at special term, to set aside the verdict upon the ground that the jurors were not sworn. In the county of Columbia, as in all the counties of this (the

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third) judicial district, the practice has been to swear the trial jurors in a body at the commencement of court for the trial of all the civil causes at that circuit. It seems that the clerk neglected this duty at the circuit at which this cause was tried and after the selection of the jury, the trial proceeded without anything being done or said as to the swearing of the jury. The trial was begun April 13, 1885; the cause submitted to the jury on the twenty-second, and the verdict rendered on the twenty-third. The counsel for the defendant did not learn that the jury was not sworn until the mid twenty-third day of April, about an hour previous to the verdict.

The question which this motion then presents is: If a trial proceeds, and a verdict be rendered without a jury being sworn, is such a verdict irregular and void if neither party asked that the oath should be administered? In other words, is the swearing of the jury essential to the validity of the verdict? The question, though novel in the form in which it is presented — the omission to swear an entire jury — involves no new principle but one well settled. That which the law requires to be done for the protection of a party may be waived, and the failure to object is a waiver. Neither can the failure to object be excused by alleged ignorance, for a party is presumed to know what he could easily have ascertained; and if a party wishes for his protection that to be done which the law directs, ordinary diligence requires him to make inquiry whether or not the statute has been complied with, and not to sit with folded arms and assume that others will care for his rights, or to watch, with closed lips, to see if some omission does not occur which will render all that is done of no effect.

The Code of Civil Procedure (*sec.* 1166) declares "the first twelve persons who appear, as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn, and constitute the jury to try the issue."

This portion of the section quoted (it was added to by

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chapter 234 of the Laws of 1883 by disqualifying jurors related by consanguinity or affinity in the same cases in which judges are disqualified; but requiring the objection to be made before opening the case) is almost a literal transcript of the Revised Statutes (2d ed., 438, sec. 61), as indeed the most of the provisions of the Code in regard to jurors are.

The statute and the Code undoubtedly prescribe a rule to be followed, both as to who the twelve jurors are to be, and the administration of the oath, but it was never supposed that, in regard to either the requirements could not be waived. If for example the first twelve found indifferent were not sworn, but some others were without objection taken, would the verdict be set aside as irregular because the statute requirement, that such first twelve must be the jury, is jurisdictional? That portion of the section is as mandatory as the other, and if the objection fails in the one instance it must in the other. And what is true of the provisions of this section is equally true of others in regard to the drawing, summoning, selection and qualifications of jurors; and various other provisions regulating the practice of the courts. They all speak of certain things to be done, and yet when those have been omitted in every instance, when such omission has been made the ground of a motion, it has been held to be waived by want of the interposition of an objection at the proper time.

In *Bennett agt. Matthews* (40 How., 428), the alienage of one of the jurors was made the ground of a motion to set aside the verdict, and as an excuse for not making the objection upon the trial, ignorance of the fact was urged. The statutes of the state declared an alien "incapable * * * of serving on any jury" (3 R. S. [5th ed.], 8, sec. 42), but the court nevertheless denied the motion, holding that the failure to make the objection was a waiver, even though the fact of the alienage of the juror did not "come to their knowledge until after the trial.

So, too, when motions have been made to set aside verdicts upon the ground that one or more of the jurors was related

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to one of the parties within the degree which rendered jurors incompetent, though the fact was unknown at the time of the trial, it has been held that the failure to object waived the objection (*Schuyler agt. Thompson*, 15 Abb. [N. S.], 220; *Salisbury agt. McClaskey*, 26 Hun, 262).

So, too, it has been held that express statutes as to the mode of selecting a referee and as to his being sworn, can be waived by not making the objection (*Whalen agt. Supervisors*, 6 How., 278; *Keator agt. The Ulster and Delaware Plank Road*, 7 How., 41; *Nason agt. Luddington*, 56 How., 172).

In *Howard agt. Setwon* (1 Den., 440) it was decided that though a statute of the state required arbitrators to be sworn, yet a procedure with the trial without demanding it to be done was a waiver. The opinion of the court, per BRONSON, J., bears directly upon the present motion because he likens the provisions of the statute requiring arbitrators to be sworn to those requiring judges and jurors also to be sworn, and argues that because the necessity of an oath can be waived in regard to the latter (judges and jurors), it can be in the case of arbitrators.

The exact question involved in this matter was, however, presented in *Hardenburgh agt. Crarey* (15 How., 307). One of the jurors in that case had not been sworn and that fact was unknown to the parties. A motion was made to set aside the verdict on that ground, and the court (HARRIS, J.) held, writing an opinion to sustain it, that the failure to object was a waiver, and that ignorance did not excuse the want of an objection. The fact is, and so judge HARRIS held, that the language of the statute then in force, which is identical with that of our present Code, required a juror to be sworn in each case; and the practice of swearing jurors in a body for all the issues of a circuit can only be upheld by the absence of an objection to the non-swearing in the case which is tried. When, therefore, the counsel for the defendants undertake to excuse the want of an objection by the plea of ignorance, in addition to the answer hereinbefore given, that

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what a party can readily know, he is presumed to know, it can also be said that they knew when they commenced the trial of the action that the oath required by the Code—well and truly to try that issue—had not been administered, and, therefore, when they proceeded with the trial without demanding its administration, they deliberately and with knowledge waived the doing of the very thing, on account of not doing which they now move.

The principle is fundamental that when a court has jurisdiction of the subject-matter and the parties, statute and constitutional rights may be waived, and the failure to object is a waiver (*People agt. Globe Mutual Life Insurance Company*, 82; see page 91 and authorities there cited; see, also, pages 95, 96, 97). There is no reason why that principle is not decisive of this case. It has been applied again and again, as has been shown, in instances very similar to the present, and it would be a grievous wrong, when no injury has been done, to nullify the long and expensive trial which has been had.

If then there was no curative statute this motion should be denied. The Code, however, declares (*sec. 721*): "In a court of record, when a verdict, report or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected, by reason of either of the following imperfections, omissions, defects, matters or things, in the proofs, pleadings or other proceedings. * * * 12. For an omission on the part of a referee to be sworn, or for any other default or negligence of the clerk, or any other officer of the court, or of a party, his attorney or counsel, by which the adverse party has not been prejudiced."

It will be observed that the omission to swear a referee is expressly declared not to be fatal to the report. This provision was inserted in 1879 for the purpose, as is declared in the codifier's notes, of quieting "doubts in cases where the direction of section 1016 (*post*), had not been followed." Section 1016 is the one which requires the referee to be sworn,

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and which provides that the waiver of the oath "may be made by written stipulation or orally. If it is oral, it must be entered in the referee's minutes." Its insertion in that section, and in the subdivision which has been quoted, shows the intent of the section. The neglect to swear the jury was the "default or negligence of the clerk," and as that was inapplicable to the case of a referee the addition referred to was made. As then the neglect to swear a referee does not *per se* vitiate a report or judgment; and as the necessity of an oath to a referee is as great as that to a jury; and as the omission to swear was the "default or negligence of the clerk," it must be held that the want of the oath to the jury in this case does not, unless the party swearing has been prejudiced, vitiate the verdict.

The oath of a juror cannot be received to impeach a verdict, nor are the declarations of a juror after it has been rendered any evidence. The affidavit of the juror; and those stating conversations with another juror are not received as evidence upon this motion. Excluding these to which reference has been made, as the law clearly requires they should be, there is an entire absence of proof to show that the defendant has been injured. The affidavits on the other hand submitted by the plaintiff as well as the proceedings of the trial, of which the judge writing this opinion has personal knowledge, satisfy him that the defendant has received no injury by the omission to swear the jury, and that therefore section 721 of the Code, as well as well-established practice, requires the denial of this motion.

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SURROGATE'S COURT.

In the Matter of a Motion to Remove a Special Guardian in the Estate of JAMES GRIFFITHS HENRY, deceased.

Special guardian — Who should not be appointed — Rule 10 of the surrogate's court.

In a controversy over probate a special guardian of an infant interested in the estate should not be appointed upon the nomination of the proponent; nor should any person be appointed such guardian who is associated in business with the proponent's attorney or counsel.

Rule 10 of the surrogate's court must be strictly enforced, unless perhaps when it is clearly apparent that the interests of the infant will be best subserved by the establishment of the disputed paper as a will. In case a special guardian has been inadvertently appointed in disregard of Rule 10 he should be superseded.

New York county, July, 1885.

ROLLINS, S. — The paper purporting to be the last will and testament of James Griffiths Henry was admitted to probate as such on October 25, 1883, having been theretofore propounded by Sarah M. Henry, whom it named as its executrix. On October 17, 1884, Evan J. Henry filed in this court a petition for revocation of such probate, declaring himself therein to be the father of decedent and his only next of kin, and protesting that the proponent, who claims to be decedent's widow, had never been his lawful wife.

On the 24th of April, 1885, the proponent filed a petition alleging that her husband left him surviving an infant son, whereof she was the mother, and that by the will here in dispute such son was named as a beneficiary. The petition concluded with a prayer for the appointment of Charles G. Cronin, esq., as special guardian to protect the rights of such infant in the proceeding for revocation. An order appointing Mr. Cronin such special guardian was thereupon entered. It was entered improvidently, involving, as it did, a violation of Rule 10 of the surrogate's court, by which rule it is, among

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other things, provided that in a proceeding for probate a special guardian will not be appointed on the nomination of a proponent to represent the interests of an infant.

The order is also obnoxious to Rule 10 in another particular. In an affidavit filed by Mr. Cronin in opposition to this motion he admits the truth of the statement in the moving papers that he is connected in business with Mr. Woodbury, "who may," he says, "and probably will, act as counsel for the proponent" in the proceeding for revocation. Mr. Cronin insists, however, that in that proceeding the interests of the child and those of the mother are identical. If this were the case, and if no contingency could arise in which their respective interests would clash, I might decline to vacate this appointment in spite of its irregularity. But, in case the validity of proponent's marriage and the legitimacy of her child shall be established upon the trial of the preliminary issue involving those questions, I am convinced that the infant should be represented, not by a guardian selected by the proponent employed in the office of her counsel and in natural sympathy, therefore, with her wishes, but by one who can determine without prejudice what attitude the best interests of the infant will require him *then* to take in the proceeding for revocation (See *Matter of Tunis Cooper's Estate*, *N. Y. Daily Register*, April 24, 1885; 4 *Surr. Dec.*, —). The order of April twenty-fourth must, therefore, be vacated. I think it proper to add that this decision involves no reflection upon the personal character or attainments of the present guardian, to whom the surrogate of his own motion has repeatedly intrusted the protection of the interests of infant parties to proceedings in this court.

Wells agt. Lachenmeyer.

SUPREME COURT.

CHARLOTTE F. WELLS agt. AUGUST LACHENMEYER.

Husband and wife — Liability of husband for the wife's debts — Question for jury.

In a suit to recover for moneys advanced to the wife of defendant, where evidence was given tending to show that some portion of such advances was made for the purpose of procuring necessities of food and clothing, it was a question of fact for the jury to determine whether or not such advances were made because of the wife's necessities, and under such circumstances that the same should be chargeable to the husband.

First Department, General Term, August, 1885.

Before DAVIS, P. J., DANIELS and BRADY, JJ.

APPEAL from judgment on dismissal of complaint.

Albert Day, for appellant.

J. C. J. Langbein, for respondent.

PER CURIAM. — There was sufficient evidence tending to establish the alleged marriage to require that question to be sent to the jury. In respect to the advances made by the plaintiff to the wife of the defendant, assuming her to have been his wife, there was evidence tending to show that some portion of such advances was made for the purpose of procuring necessities of food and clothing.

It is a question of fact for the jury to determine whether or not such advances were made because of the wife's necessities, and under such circumstances that the same should be chargeable to the husband. It was not necessary to show that the plaintiff herself made the purchases. If she handed money to the wife for that purpose, that fact is equivalent, we think, to the act of furnishing the necessities. The jury might well have found on the evidence that some portion at least of the money so advanced was directly applied to the

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specific object, to wit, the purchase of clothing and of necessities by the wife.

It was error to take the case from the jury on all the questions involved, and therefore we think a new trial should be ordered.

Judgment reversed, new trial ordered, costs to abide event.

SUPREME COURT.

THE UNITED STATES ICE AND REFRIGERATING COMPANY agt.
SAMUEL C. REED *et al.*

Corporation — When deemed to have acquiesced in illegal acts of their trustees.

A trustee of a corporation, whose attendance is necessary to make a quorum, cannot act upon a claim in his own favor to bind the corporation, and by his presence he thus acts.

Such a transaction could be at once assailed in a court of equity, and would be set aside in a suit brought by the corporation, or in the event of its unwillingness to proceed at the instance of the stockholders interested at the time.

But such conduct and action on the part of the trustees of a corporation may, with knowledge thereof, be acquiesced in and accepted by the corporation and the stockholders, in which event they could not afterwards assail it, especially when such acquiescence has continued for several years, and the stock donated has been actually received by the donee, and has formed the subject of new engagements and liability on his part with others.

When stockholders neglect to promptly and actively condemn the unauthorized act of the trustees, and to seek judicial relief, they will be deemed to have acquiesced in it, and an unconscionable agreement will not be disturbed when there has been a ratification of it after time has been had for consideration.

Special Term, August, 1885.

Silas M. Stilwell and William Fullerton, for plaintiff.

E. L. Fancher, for defendants.

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VAN VORST, J. — The learned counsel for the plaintiff, in his brief and argument submitted, subjects the action of the trustees of the plaintiff corporation, in donating to the defendant Reed all the shares of stock owned by the corporation, to severe criticism. The trustees occupied a fiduciary position, and as far as the defendant Reed was concerned, being himself a trustee, he was prohibited from acting in his own favor upon a resolution donating to himself the property of the corporation, although he had rendered services to the corporation as president, for which he had received no salary, and had paid out moneys in its behalf. No salary had been theretofore affixed to the office, and the amount of his disbursements for the corporation was not stated in the resolution and do not appear to have been adjusted in an orderly way. A trustee, whose attendance is necessary to make a quorum, cannot act upon a claim in his own favor to bind the corporation, and by his presence he thus acted. And such a transaction could be at once assailed in a court of equity, and would be set aside in a suit brought by the corporation, or in the event of its unwillingness to proceed, at the instance of the stockholders interested at the time. These conclusions are amply sustained by authority in this state (*Dunscombe* agt. *N. Y. H. and N. R. R. Co.*, 84 *N. Y.*, 190; *Butts* agt. *Wood*, 37 *N. Y.*, 317; *Coleman* agt. *Second Ave. R. R. Co.*, 38 *N. Y.*, 201). But such conduct and action on the part of the trustees of a corporation may, with knowledge thereof, be acquiesced in and accepted by the corporation and the stockholders, in which event they could not afterwards assail it, especially when such acquiescence has continued for several years, and the stock donated has been actually received by the donee, and has formed the subject of new engagements and liability on his part with others.

The resolution donating this stock was passed on the 16th day of September, 1879, as the minutes of the trustees shows, and the stock immediately passed to Reed. Neither the corporation itself nor any stockholder made any objection at the

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time, and failed altogether to take any action adversely to it until this suit was brought, in November, 1884, more than five years after Reed received the stock in pursuance of the resolution. Randall, who was a stockholder and also a trustee, was not present at the meeting when the stock was donated to Reed. He has testified that he received no notice of this meeting. A notice was, however, prepared by Reed to be mailed to him, and was given to a messenger for that purpose. Whether actually mailed does not appear. Under the evidence he received no notice. Bradley was a trustee, although Reed believed he was not. Whether or not he was notified of this meeting does not appear. He did not attend. Randall was, however, afterwards informed of the resolution and he approved of it.

On the 16th day of August, 1880, an agreement in writing was entered into between the defendant Reed, as a party of the first part, the plaintiff corporation of the second part and Ezra A. Hoyt of the third part. By this agreement Reed, amongst other things, sold to Hoyt 4,500 shares of the stock of the plaintiff corporation, which amounts included the shares donated to Reed by the resolution above mentioned. It was a part of this agreement that the resignation of the three trustees should be obtained, and that the control of the corporation should substantially fall into the hands of Hoyt and such trustees as he should designate. Hoyt became president of the corporation in 1880, and a majority of the trustees was of his selection, and he and they assumed the management of the corporation. How soon he became actually acquainted with the fact of the passage of the resolution in 1879 does not distinctly appear. The book containing the minutes of the trustees was under his control. He had, however, applied to Reed, and had obtained from him extensions of time in which to pay installments upon the purchase of Reed's stock. Early in January, 1881, he first called Reed's attention to the resolution of the trustees in question, and said in substance that it was not right, and he added, "I can bring that up if I

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want to," to which Reed replied "that he might bring it up." Hoyt then said, "I want you to put off the payment of this, and I will not bring it up." Hoyt, however, did not bring up the subject. After this he attempted to sell the shares he had purchased from Reed to others. Randall also co-operated with Hoyt in endeavoring to sell the stock purchased from Reed.

These acts amount to an acquiescence in the lawfulness of the title of Reed to this stock on the part of those engaged therein. The corporation itself was a party to the agreement by which Reed sold the stock to Hoyt. That is an acquiescence on its part as to his right to sell these shares standing in his name on the books of the corporation. Hoyt and his management acquiesced for years, until, for reasons personal to himself, this action was directed to be brought in 1884. Hoyt has been prosecuted by Reed for the balance remaining due on his agreement for the purchase of these shares. The company itself has become bankrupt and has passed into the hands of a receiver. It is too late after such long acquiescence for the corporation to recede. The stockholders at the time have not objected. At least they have remained silent. That amounts to acquiescence, after such lapse of time.

As to stockholders buying into the corporation afterwards, they certainly cannot impeach a transaction consummated and ratified by the corporation before they acquired title to their stock. Acts which are not "*per se*" illegal or "*malum prohibitum*," but which are *ultra vires*, affecting, however, the interests of stockholders only, may be made good by the assent of stockholders (*Kent* agt. *Quicksilver Mining Co.*, 78 *N. Y.*, 159; *Sheldon H. B. Co.* agt. *Eickmyer H. B. Co.*, 90 *N. Y.*, 607; *Hoyt* agt. *Thompson, Exrs.*, 19 *N. Y.*, 208). And when stockholders neglect to promptly and actively condemn the unauthorized act of the trustees, and to seek judicial relief, they will be deemed to have acquiesced in it, and an unconscionable agreement will not be disturbed when there has been a ratification of it after time has been had for consideration (*Kent* agt. *Quicksilver Mining Co.*, *supra*).

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After considering the questions raised, and upon all the facts appearing in evidence, there must be judgment for the defendants dismissing the plaintiffs' complaint, with costs.

SUPREME COURT.

AMBROSE L. OVERHEISER agt. PHEBE O. MOREHOUSE, executrix of, &c., of ALANSON MOREHOUSE, deceased.

Costs, upon the reference of a claim against a decedent — When recoverable — Disbursements recoverable.

When upon a reference of a claim under the Revised Statutes against a deceased person's estate a report has been made in favor of the claim, costs are not recoverable, unless the payment of such claim has been unreasonably neglected or resisted.

A large reduction of the *balance* claimed by the bill as presented justifies the resistance.

Neither is it unreasonable for the executrix, who is a sister of the claimant when such claim is for board furnished to the decedent and his wife, the defendant, during a period of several years, and the value thereof is one of the questions in dispute, to insist that the amount to be paid shall be established by a reference.

Nor is it unreasonable for the residuary legatee under the will of the decedent, who is a stranger to the whole transaction, to inquire by means of a reference into the justice and legality of the claim.

Upon such a reference, however, "the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law."

The clause in section 817 of "The Code of Procedure," which gave them, was not repealed by the adoption of part 2 of "The Code of Civil Procedure;" nor by chapter 245 of the Laws of 1880, which professed to repeal "The Code of Procedure" left unrepealed by chapter 818 of the Laws 1877, with the exceptions therein stated. The repealing act of 1880, retained and preserved "the right of a prevailing party to recover" such disbursements, using the exact language of said section 817.

Upon a full consideration of the question, the decisions in *Sutton* agt. *Newton* (2 How. [N. S.], 56) and in *Hull* agt. *Edmunds* (67 How., 202) adhered to; and *Miller* agt. *Miller* (32 Hun, 481) held untenable.

When the question to be determined relates to the *status* of a statute which is involved in a maze of legislation, the same weight cannot be

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given to a decision of the general term as there would be to one involving a pure legal principle. In such a case, it is the duty of the special term when it sees plainly that statutory provisions have been overlooked to follow its own clear convictions, stating its reasons therefor respectfully, thus leaving to the general term a review of the subject.

Ulster Special Term, August, 1885.

MOTION for costs upon a reference of a claim against the estate of a deceased person under the Revised Statutes.

A. F. B. Chace, for plaintiff and motion.

R. E. Andrews, for defendant and opposed.

WESTBROOK, *J.* — The plaintiff, who has obtained the report of a referee in his favor for the sum of \$4,468.62, moves for the confirmation of the report and for costs. To the former, as there has been no case with exceptions presented, nor any cause shown why the plaintiff should not have a confirmation of the report, he is entitled, but to the latter there are serious objections to be considered.

It was a reference under part 2, chapter 6, title 3, article 2 and section 36 of the Revised Statutes (2 *Edm. ed.*, 91). The claim as presented was for \$9,013.08, upon which there was a credit given for \$1,800, making the balance claimed by the bill as originally presented \$7,213.08. Subsequently, however, an amended bill was presented by which the balance claimed was \$9,462.68.

The report of the referee found the indebtedness of the deceased to the plaintiff to be \$7,829.99, and that of the plaintiff to the deceased \$4,072.73, leaving due from the latter, at the time of death, to the former, \$3,757.26. The referee allowed interest on the balance found due to the plaintiff from the day of the commencement of this proceeding (May 3, 1882), which was \$711.36, making the total sum found due at the date of the report (June 26, 1885) \$4,468.62.

It was conceded upon the argument, and so the law is, that

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to justify the recovery of costs as in an action in which costs are given, the claim of the plaintiff must have been unreasonably resisted. Whether or not the plaintiff is entitled to referee's fees and disbursements will be hereinafter considered, but the question first to be discussed is, was the payment of the claim of the plaintiff unreasonably resisted or neglected.

The reduction of such claim from \$7,213.08, as originally presented, to \$4,468.62, and the establishment of a set-off of \$4,072.73 instead of \$1,800, as allowed upon the bill as presented, are facts which conclusively demonstrate that the resistance to the demand of the plaintiff was not only not unreasonable, but, on the contrary, reasonable and necessary.

It was strenuously, however, urged by the counsel of the plaintiff that as he had proved his claim by the defendant, she had full knowledge of its justice, and therefore it should have been paid without a reference. To this argument there are two answers: 1st. The justice of the cause of action of the plaintiff alone, unless the bill as presented gave a proper credit, would not make resistance to the payment of the balance demanded unreasonable. The defendant may have proven the integrity and propriety of the plaintiff's charges, but either her evidence or some other testimony submitted to the referee satisfied him that the credits or set-off upon or to the bill as presented were over \$2,000 greater than the plaintiff's affidavit attached thereto admitted. The resistance was to the payment of the balance demanded, and its large reduction is the justification of the defense made. 2d. The defendant (the executrix) is the sister of the plaintiff. The claim of the plaintiff was for board of the deceased and his wife (the defendant), and horse keeping during a period of six years (from February 2, 1875, to February 2, 1881); and as the payment and allowance of such an account, involving among other things questions of value, by a sister in favor of a brother out of the residuary of an estate devised to strangers, was sure to be contested upon an accounting, it was not unreasonable that the defendant should for her own protection insist that

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the amount to be allowed and paid should be fixed and established by a legal proceeding. Neither was it unreasonable for the residuary legatee under the will of the deceased, "The Children's Aid Society of the city of New York," to inquire strictly and sternly into the validity of a claim of the character of that presented by the plaintiff, concerning which it had no knowledge. It was hardly reasonable to suppose that board, lodging, and horse keeping would be furnished by a needy brother-in-law to a relative abundantly able to pay (the circumstances of the parties were conceded upon the motion) for a period of six years, and an indebtedness allowed to accumulate of several thousand dollars. This was scarcely to be expected, and the residuary legatee, itself a trustee charged with a sacred trust in behalf of helpless ones, only did its duty reasonably, in making the defense.

For the reasons which have just been given, the motion, so far as it asks for costs generally and for an allowance, must be denied, and with the enunciation of this conclusion we are brought to the second question: Is the plaintiff entitled to referee's fees, witnesses fees and disbursements?

It will be conceded that by section 317 of "The Code of Procedure" such fees and disbursements were given. That section provided that when a claim against a deceased person's estate was referred under the provisions of the Revised Statutes, as this one was, that "the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law." It will be further conceded that if this provision is unrepealed, or if it has since been re-enacted, that the plaintiff is by this motion entitled to their allowance. In *Sutton agt. Newton* (2 How. [N. S.], 56) the judge writing this opinion, after a careful examination of the question, came to the conclusion that the provision quoted was still in force. That conclusion, in the light of *Miller agt. Miller* (32 Hun, 481) and of an unreported case (*Dodd agt. Dodd*), to which allusion will be presently made, he is asked to reconsider. The request will

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be cheerfully complied with, and such reconsideration will not be conducted with a view to sustain a previous conclusion, but to reach the exact right of the proposition to be considered.

Section 317 of the old Code, "The Code of Procedure," regulated the recovery of costs in an action by or against an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue. The same section further declared (a quotation already in part given is repeated to show its connection): "But this section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom, by section forty-one of title three, chapter six, of the second part of the Revised Statutes; and whenever any claim against a deceased person shall be referred, pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law."

The first thirteen chapters of our present code, "The Code of Civil Procedure," took effect (*chap. 318, Laws of 1877*) September 1, 1877. That act (*chap. 318, Laws of 1877*) was passed May 22, 1877, and it suspended the operation of the present Code, known when first enacted as "The Code of Remedial Justice," from May 1, 1877, the date when it originally took effect, to September 1, 1877, as just stated. The general repealing act of "The Code of Procedure" was passed June 5, 1877, and it declared among other things: "Section 1. The following acts and parts of acts heretofore passed by the legislature of the state are hereby repealed, to wit: * * * 4. All of the Code of Procedure, except the following sections and parts of sections thereof, to wit: * * * Sections three hundred and eleven to three hundred and twenty-two, both inclusive."

As then, section 317 of the old Code was expressly retained by the repealing act of 1877, it is clear that, after the first thirteen chapters of our present Code took effect, and until at least the subsequent nine chapters of the present Code,

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known as "Part II of the Code of Civil Procedure," took effect (September 1, 1880), "the prevailing party" in a *reference* of the character of the present, recovered "the fees of referees and witnesses and other necessary disbursements to be taxed according to law." In an *action*, however, against executors or administrators, even though a recovery was had, no costs were taxable unless the court so ordered, upon the ground either that the defendant had refused to refer the claim or that he had unreasonably neglected or resisted payment (2 *Edm. ed. of R. S.*, 92, *sec.* 41). By sections 1835, 1836 and 3246 of such "Part II of the Code of Civil Procedure," the rule for the recovery of costs "*in an action*," prescribed by section 317 of the old Code, was preserved. The present Code, however, neither in the section referred to nor in any other part, expressly states whether or not the remaining provision of section 317 of the old Code, which provided that in references of the character of the present, the prevailing party should "recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law," is still in force. It is true that section 3246 of the present Code is a substantial re-enactment of section 317 of its predecessor, with the clause of that section providing for disbursements in references of the character of this omitted, but as such omission merely, without a declaration that the new section is a substitute for or a repeal of the old, does not make any inconsistency between the two, it follows that the new section is no repeal by implication of any part of the old. The present section (3246), and those to which it refers (1835, 1836), only give the rule in regard to costs "*in an action*," and as the proceeding had in this case is not "*an action*," but is one upon a (to use the exact language of section 317 aforesaid) "claim against a deceased person * * * referred pursuant to the provisions of the Revised Statutes," the two are not in the least inconsistent. The correct view, therefore, is that the adoption of part two of the present Code did not repeal the provision referred to in section 317 of the old

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(*Potter's Dwarrris on Statutes*, 156, 157; *Wallace agt. Bennett*, 41 *Barb.*, 92, 95, 96, and cases there cited; *Matter of Curser*, 89 *N. Y.*, 401).

Part two of the present Code passed the legislature May 6, 1880. Four days afterwards (May 10, 1880) chapter 245 of the Laws of 1880 was passed. By its first section (*subd. 4*, page 369), the old Code was repealed. If that act had contained nothing more, very clearly the whole of the old section 317 would have been swept away. It did not, however, stop with a simple repeal, but it further provided (*pages 374, 375*): "Sec. 3. The repeal effected by the first section of this act is subject to the following qualifications: * * * 8. It does not affect the right of a prevailing party to recover the fees of referees and witnesses and his other necessary disbursements upon the reference of a claim against a decedent, as provided in those portions of the Revised Statutes left unrepealed after this act takes effect."

The point now distinctly presented is, do the words, "as provided in those portions of the Revised Statutes left unrepealed after this act takes effect," refer to "the fees of referees and witnesses and his other necessary disbursements," or do they refer to "the reference," of which the reservation also speaks? In other words, was it the intention of the clause to retain the provision in old section 317, giving referees' fees and other disbursements in a reference, which had taken place according to and under the provisions of the Revised Statutes; or did it intend to give or retain referees' fees only in those cases in which the Revised Statutes gave them? *Miller agt. Miller* (32 *Hun*, 481) and *Daggett agt. Mead* (11 *Abb. N. C.*, 116) hold to the latter view. *Sutton agt. Newton* (2 *How. [N. S.]*, 56) and *Hall agt. Edmunds* (67 *How.*, 202) to the former. Which of these two views is correct?

Certainly, as *Miller agt. Miller* is a decision of the general arm of this department, it should be followed unless it is clearly erroneous. The Code, however, has been so often changed, and those changes are so often hidden in the maze

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of conflicting statutes, that hardly the same force can be attached to a decision as to its precise condition upon a single point, as there must be to one enunciating a legal principle. Where the special term differs in the former case, and such difference amounts to a conviction, it cannot be disrespectful to submit to the appellate tribunal the reasons of a dissent, to the end that the questions in dispute may be thoroughly discussed and more deliberately considered. When the case of *Sutton agt. Newton* was decided, the attention of the judge writing this opinion was directed by eminent counsel, not interested in that case and occupying a judicial position, to *Hall agt. Edmunds* and the various statutes therein referred to, as being a better exposition of those statutes than *Miller agt. Miller*. A careful examination of the question then made induced the decision in *Sutton agt. Newton*, with the conviction that the view expressed in the opinion was so clear that the question should be again presented to the appellate tribunal. The disbursements, which that opinion holds the prevailing party in that case was entitled to as matter of right, were also properly allowable with the costs generally, upon the ground that the claim had been unreasonably resisted, and therefore no possible injustice could be done by giving the writer's views upon the question now under consideration. The point now, however, is presented somewhat differently. The conclusion has been reached in this case that the claim of the plaintiff was not unreasonably resisted, and therefore the propriety of following *Miller agt. Miller* is more forcibly presented than it was in *Sutton agt. Newton*. A careful study, however, has so thoroughly convinced the judge, to whom the present case has been submitted, that the decision referred to cannot be upheld, that he has been constrained to follow his own convictions, giving his reasons therefor, thus submitting the problem to the appellate tribunal, whether or not *Miller agt. Miller* shall be adhered to. The question is certainly approached with feelings of the highest respect for the mem-

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bers of the general term, and with the conviction that they, in common with the writer, have no other desire than the attainment of right.

Prior to an analysis of the saving clause in the repealing act of 1880, which will be presently attempted, it is well to bear in mind what has been established in the preceding part of this opinion, to wit: 1st. By the old Code (§ 317), in references of the character of the present, "the prevailing party" was "entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law." 2d. When the first thirteen chapters of our present Code took effect, by the repealing act of 1877 (*chap. 417, Laws 1877*), section 317 was continued in force. 3d. When the law was passed (May 6, 1880) adopting the remaining nine chapters of the present Code, said section 317 was still in force. It also remained in force after their adoption, because the re-adoption and the re-enactment of old statutes do not, in the absence of a clause repealing the old, or of an express declaration that the new is a substitute for the old, abrogate them, for there is no inconsistency; and the omission to re-enact a part has only the effect to allow such omitted part to stand upon its original enactment. This consequence, and this only, followed from the adoption of part two of the present Code. Sections 1835, 1836 and 3246, were simply redeclarations that all the provisions of said section 317, except the clause providing for the recovery of the disbursements aforesaid, should be in force, but the silence of our law-makers in the chapters referred to did not repeal a clear and positive provision in the old statute upon a subject which the new legislation did not profess to touch. In other words, part two of the Code provided for the recovery of costs "in an *action*" against an administrator or executor, but it said nothing about the old section 317, nor about "the fees of referees and witnesses and other necessary disbursements" which such section gave as matter of "right" to "the prevailing party," when "any claim against a deceased person" had

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been "*referred*" pursuant to the provisions of the Revised Statutes." Unless there was an intention to repeal, there was no occasion to speak — silence was the continuation of the old law (*Potter's Dwarries on Statutes*, 156, 157; *Wallace agt. Bennett*, 41 *Barb.*, 92, 95, 96, and cases there cited; *Matter of Curser*, 89 *N. Y.* 401).

We now understand the situation of the question under discussion, when four days after the adoption by the legislature of part two of the present Code, that body passed the repealing act of 1880. The effect produced by the adoption of the nine concluding chapters of the present Code was the preservation of the old rule in regard to costs "in an *action*" against an administrator or executor. For the purpose of maintaining such old rule the existence of the old section 317 was no longer necessary—sections 1835, 1836 and 3246 were full and ample to effect that object. The old section was therefore repealed, but when that was done it became necessary, unless its total repeal was intended, to declare the fate of the remaining portion of such section, in regard to which absolute silence had up to that time been maintained. It was therefore expressly further said that such repeal did "not affect the *right* of a prevailing party to recover the fees of referees and witnesses and his other necessary disbursements upon the *reference* of a claim against a decedent, *as provided* in those portions of the Revised Statutes left unrepealed after this act takes effect." Can anything be plainer? It was not the *power* to award "*costs*" in certain cases upon the establishment of sundry other facts, which was to remain unaffected, but the "*right*" (*i. e.*, the award thereof as a consequence of the recovery), to "the fees of referees and witnesses and his other necessary disbursements" by the prevailing party. The exact similiarity of the language of the saving clause of the repealing act just quoted with that of section 317 aforesaid proves that the framer of such saving clause penned it with his eye upon the provision of the section we are discussing. The identity of the language used by both can be accounted for upon no

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other hypothesis. When, therefore, in order to specify in what cases the "right" to such disbursements was given, there were added to those giving them, these further and additional words, to wit, "upon the reference of a claim against a decedent, as provided in those parts of the Revised Statutes left unrepealed after this act takes effect," the meaning was unmistakable. It was not the right to sundry disbursements, given by the Revised Statutes, which was preserved, but the "right of a prevailing party * * * upon the reference of a claim against a decedent, as provided in those portions of the Revised Statutes left unrepealed," to the particular disbursements specified in the repealing act, was retained. If there was nothing to guide us but the words and structure of the sentence the meaning would be unmistakable. When, however, we add to the language used the further arguments that the Revised Statutes never, on such a reference, gave either costs or disbursements to the prevailing party as a "right," but only empowered the court in its discretion, upon certain facts being proved, to give "costs" generally, and that the section of the Revised Statutes (2 *Edm. ed.*, 91, *sec.* 37) which gave to courts in references of this character the "power to adjudge costs, as in actions against executors" was, with the entire section which contained it, expressly retained and preserved by the same repealing act (*chap.* 245, *Laws of* 1880, *sub.* 3 of *sec.* 1, *p.* 368), the meaning becomes too clear for discussion. Under such circumstances to say, as was hastily said in *Miller* agt. *Miller* (32 *Hun*, 481), that the sentence in the repealing act "has reference *simply* to provisions of the Revised Statutes," is to declare that such sentence has no meaning whatever. An exception is only necessary when without it the thing excepted would be affected. If any part of the Revised Statutes, left unrepealed by the repealing act, gave the disbursements saved by such act, it was unnecessary to declare that such part of the Revised Statutes was unaffected by the repeal. To make that declaration is equivalent to an

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announcement that what is in fact unrepealed is unrepealed. Neither could the clause have been intended to preserve the "right" to disbursements given by the Revised Statutes, because such statutes, neither then or at any time, gave them; nor could its intent have been to preserve the power in the court to award such disbursements as a part of the costs in those cases in which, if it had been an action, they could have awarded them, because the power "to adjudge costs, as in *actions* against executors," was expressly retained by the same act; and as the right to the disbursements specified in the saving clause of the repealing act, together with others, followed the right to costs in an action of which they form a part (*Code, sec. 3256*), it was unnecessary to say a word further upon that subject. Unless, therefore, the court is prepared to say that the clause is wholly useless, it must be held, as its plain language clearly requires, that the referee's fees, the witnesses fees and disbursements, are still recoverable by the prevailing party in a reference of this character as they have been for many years. The equity of protecting a successful party against his necessary disbursements in the establishment of his claim, which are often greater than the recovery, was as great when the act of 1880 was passed as it had ever been. No complaint had been made against its wisdom; and when the right to recover sundry disbursements is plainly and unmistakably retained or given, it is not a wise exercise of judicial power to render inoperative clear words, even though in the attempted preservation or gift a reference was made to a wrong statute, as the one previously conferring the same right (*The People agt. Lucas, 25 Hun, 610, see 611*). No one can doubt that the intention was to preserve "the *right* of a prevailing party to recover the fees of referees and witnesses and his other necessary disbursements upon the reference of a claim against a decedent," for the act so declares and the exact words have just been quoted. If the grammatical construction of the sentence giving them is, as the general term assumed in *Miller agt. Miller*, that the framer of the

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clause supposed they were given by the Revised Statutes, and therefore made the section to read as if the Revised Statutes gave them, that mistake could not nullify their effect. The "right" to such disbursements, as one flowing from the recovery, as distinguished from the power to award them, is preserved, and courts should so hold without attempting to nullify them by a strained construction which makes the sentence meaningless. But there was no such mistake. The Revised Statutes, it is true, gave the court power to award "*costs*," and that was preserved, as is elsewhere shown, in the same act, but they never gave "the *right*" to such "*costs*" upon a recovery, and there never was any pretense of the *power* to award any disbursements without awarding costs generally in a proceeding of this character until section 317 of the old Code gave such disbursements as a "*right*" to "the prevailing party. In construing a statute it is to be assumed that the legislature knew the exact *status* of the statutes, and therefore, when they gave or retained the "right" of "the prevailing party" to them, and used the exact words of the statute which originally gave them, they meant to preserve them as there given; and the reference to the Revised Statutes is to them as giving the *mode of procedure* — the reference — and not the disbursements, which are retained. The excepting and saving clause of the repealing act is too clear for doubt. Its author evidently wrote it, as before stated, with an open eye resting upon section 317 of the old Code. This the identity of the language proves, and that both give the same disbursements is, as it seems to me, too clear for discussion and debate.

The opinion would close at this point if the counsel of the defendant had not, as he properly did, called the attention of the court to the opinion of judge Bockes in the unreported case of *Dodd* agt. *Dodd* (decided by the general term of this department), in which the writer of this opinion as a member of such court concurred. The fact, however, that the judge to whom this case has been submitted has once given an

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opinion to the contrary of that herein expressed, is no answer to the arguments now presented. Nay, duty requires him to correct and point out his own error with the same freedom and candor that he would exercise were he dealing with the supposed error of another.

The explanation is simple. *Dodd* agt. *Dodd* was not a case argued orally. It was submitted to the court upon the printed case and points. Mr. D. S. Potter was counsel for the plaintiff, and Mr. P. C. Ford for the defendant. The special term (judge J. POTTER presiding) had allowed the plaintiff full costs upon the ground that the claim had been unreasonably resisted. In his points (and they are now before the writer) the counsel for the plaintiff nowhere discusses the question of his right to disbursements under section 317 of the old Code, nor is any reference made to the repealing act of 1877 nor to that of 1880. The aim of the points is to show that "costs are in the discretion of the court," and that they were in the discretion of the court because the Revised Statutes gave the court the power to "adjudge costs as in actions against executors," and also because the reference was a "special proceeding," and not "an action." He further claimed that "section 3240 of the Code provides expressly that costs in a special proceeding, not specially regulated by the Code itself, may be awarded to any party *in the discretion of the court*. Costs being in the discretion of the court to give or withhold, the appellate court will not reconsider the question." The points then proceed to argue that the discretion of the special term was wisely exercised.

The counsel for the defendant argues in his points (they are also before the writer) that costs should not have been allowed because, among other reasons stated, the claim was not unreasonably resisted. There is no allusion to the right to disbursements except this: "Under the old Code, the prevailing party in such proceedings was entitled to recover his disbursements, even though he might not be entitled to costs;

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but this provision has been omitted in the new Code, so that disbursements must now follow costs."

The case was assigned to brother BOOKES to examine. The plaintiff, as has been said, did not claim disbursements apart from costs, and made no allusion to the condition of the law upon the subject. The defendant, also, did not refer to the statutes at all, and only insisted that no disbursements separate from costs could be recovered because the provision in the old Code giving them had "been omitted in the new Code." The learned and careful judge, to whom the case was committed for examination, was thus easily led into error. Through several pages in an exhaustive opinion he demonstrates that the plaintiff should not recover costs. When he reaches the question of disbursements, having been thrown off his guard by the want of presentation of that question by the plaintiff's counsel, he simply adopts the erroneous view of defendant's counsel, saying: "Under the former Code (*sec.* 317) the plaintiff would have been entitled to recover 'the fees of the referee and witnesses and other necessary disbursements to be taxed according to law,' although not entitled to full costs, as in an action (*Penkernelli agt. Bischoff*, 2 *Abb. N. C.*, 107; *Powell agt. Fry*, 19 *Hun.*, 600). Such allowance would seem unjust in a case like the present, when the entire contest was over an item found to be fictitious. But the clause of section 317 of the former Code above cited is omitted from section 1836 of the Code of Civil Procedure, which latter section supersedes the former and controls the case now before us (*See, also, sec.* 3246)." This is all the opinion says upon the question.

The conclusion stated by the judge, that the omission from the new Code was a repeal of the clause giving disbursements in a reference of this character as a matter of "right," was erroneous, as has been shown. It looked plausible, and it was in the points submitted *an uncontroverted* proposition. Errors in judges, into which they are sometimes led by the oversight of counsel, are pardonable. A judge is a man, liable to err,

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and when so learned and acute a jurist as judge Bockes fell into this error, it was but reasonable to suppose that another judge, who had the same reasons to err, and to those in addition the opinion of a learned judicial brother sustaining the same error, would concur.

Under the circumstances narrated the concurrence of the writer in *Dodd* agt. *Dodd* was given. None of the questions which have been considered were discussed. Nay, the counsel for the plaintiff by his silence, and by his line of argument, conceded that the disbursements apart from the costs were not recoverable; and a brother judge, who had examined the question fell into an error. The opinion of judge Bockes was carefully read upon the main question discussed, but that in regard to disbursements, *substantially conceded in the points*, was not considered as it should have been. The case had been entirely forgotten when the opinion in *Sutton* agt. *Newton* was written. Had it been remembered, it would not have changed the result, but would only have induced the fuller, and it is hoped more satisfactory, discussion of the question, which has now been attempted.

The motion for costs generally and for an extra allowance must be denied, but the order should provide that the plaintiff shall recover the fees of the referee and witnesses and his other necessary disbursements, to be taxed according to law.

SUPREME COURT.

ALFRED NELSON, as executor, &c., of FRANZ O. ERICSON, deceased, respondent, agt. SUTHERLAND TENNEY, as assignee of ALEXANDER H. FINDLAY, appellant.

Assignment — Surviving partner — No power without consent and concurrence of the representative of deceased partner to make assignment for benefit of creditors of the firm with preferences — When court of equity will take possession of estate and appoint receiver.

A surviving partner has no power without the consent and concurrence of the representatives of the deceased partners to make an assignment to a

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trustee for the benefit of creditors of the firm, and to create preferences among the creditors by such an assignment; and the attempt to do that is such an abuse of the surviving partner's powers as justifies the representatives of the deceased partner in applying to a court of equity to take possession of the estate by a receiver.

First Department, General Term, July, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from order of the special term appointing a receiver.

John Lindley, for appellant.

Francis Forbes, for respondent.

DAVIS, P. J. — This action is brought by Alfred Nelson, as executor of the last will and testament of Franz Oscar Ericson, to set aside an assignment with preferences made by Alexander D. Findlay to the appellant Tenney. Findlay and Ericson were copartners, carrying on the business of tailors in the city of New York, under certain articles of partnership, a copy of which is annexed to the complaint. On the 22d of June, 1884, Ericson died, leaving Findlay him surviving, and leaving a last will and testament which nominated the plaintiff, Alfred Nelson, as executor, and which was subsequently probated, and letters testamentary thereon were duly issued to the plaintiff. Findlay, as surviving partner, continued in possession of the store and the stock in trade, and managed and carried on the business for the purpose of disposing of the stock and collecting the debts owing to the firm until the 20th day of August, 1884, at which time he made an assignment to the appellant Tenney without consultation with the executor and without his consent. The assignment prefers two creditors of the firm in the sum of \$4,500, and directs that after their payment the surplus in hand be applied to the payment of the other debts of the firm ratably to their several amounts. The appellant accepted the trusts of the assignment and took possession of the property. The appellant demurred to the complaint, and the order appealed from was made upon the pleadings and upon affidavits.

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Two questions have been argued on this appeal, first, whether the surviving partner of a firm has power to make an assignment of the firm's assets to a trustee creating preferences among the creditors, and, secondly, whether the executor or administrator of a deceased partner can maintain an action to set aside such an assignment.

As to the first of these questions, we are of opinion upon a careful examination of the authorities that a surviving partner has no power, without the consent and concurrence of the representatives of the deceased partner, to make an assignment to a trustee for the benefit of the creditors of the firm, and to create preferences among the creditors by such an assignment. Whether it can be done with such assent is a question not now before us. It is undoubtedly true that a surviving partner takes by virtue of his title as partner the assets of the firm with authority, for the purpose of closing up the affairs of the partnership, to sell and dispose of or collect the same and convert them into money and apply the same in payment of the partnership debts (*Collyer on Part.*, secs. 123-129; 3 *Kent*, 37; 1 *Parsons on Cont.*, 183; *Story on Part.*, sec. 346); and in doing this he has the right, in the exercise of his discretion, to pay the debts of the firm in full or in part in such order as he shall deem just and equitable, although his doing so may operate to give preference to the creditors whom he thus pays. That this is the law must be regarded as settled in this state by *Loeschigk agt. Hadfield* (51 *N. Y.*, 660, *reported below*, 5 *Robt.*, 26; 19 *Abb. Pr.*, 169), and *Cushman agt. Addison* (52 *N. Y.*, 628).

In doing this he is acting in pursuance of the authority existing in him as surviving partner. He is liable, both as surviving partner and individually, for all the partnership debts, and, his right to the possession and control of the property for the purpose of paying and extinguishing the copartnership debts entitles him to the exercise of his own discretion in the application of the assets or other proceeds for that purpose (*Eybert agt. Wood*, 3 *Paige*, 517). He is no

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more a trustee in any strict sense of that term for the creditors of the firm than is any other debtor for his creditors, and their remedies against him in the collection of the debts of the firm are precisely the same as those which existed against the firm prior to its dissolution by the death of one of its members. But as between him and the representative of the deceased partner, a clear and well defined trust exists which devolves upon him duties and obligations in respect of the disposition and application of the assets of the firm and their proceeds which equity recognizes, and when abused or evaded will interpose to enforce. The duties of that trust are not such that they cannot be performed by agents, servants or attorneys acting under his control or direction. He may, therefore, employ clerks and attorneys and authorize them to act for him and on his behalf in performing those duties, precisely as the firm might have done for the purpose of closing its affairs. But it is a very different question whether he can by an assignment of the property of the firm transfer the trust to another trustee in the manner attempted to be done in this case, imposing upon that trustee duties which operate as preferences among the creditors of the firm and over which the surviving partner has no control. Such an act is an entire abnegation of the duties of the trust existing between himself and the representatives of the deceased partner, and if it be attempted to be done without the consent of such representatives equity will, we think, step in to prevent the consummation of the attempt, and take possession of the property through its receiver, for the purpose of distribution among the creditors in such manner as shall be just and equitable.

The plaintiff in this case is the sole representative of the deceased partner, as executor of his last will and testament. He shows that the assignment by the surviving partner was made without consultation with him, and without his knowledge or assent; and that he has transferred the entire remaining assets of the firm to the appellant, and thereby sought to

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transfer to him the duties of the trust existing between the surviving partner and the executor. In such a case, we think a court of equity has a clear right to intervene and, by the appointment of a receiver, proceed to close up the business of the copartnership, and discharge its duties in such manner as will protect the rights of the legal representatives of the deceased partner. This must be the result, we think, springing out of the general rule as laid down by Mr. justice STORY, in *Story on Partnership* (sec. 344), where he says, after speaking of the general powers of receivers: "However, if there be any danger of abuse or positive misapplication of funds by the surviving partner, a court of equity will interpose and restrain it by injunction, and even appoint a receiver upon the application of the representatives of the deceased."

The surviving partner, being a trustee for the settlement of the estate as between himself and the personal representatives of the deceased partner, cannot pass his whole duty over to another trustee without the consent of such representatives, and the attempt to do that is, in our judgment, such an abuse of his powers and duties as justifies the representatives of the deceased partner in applying to a court of equity to take possession of the estate by a receiver. It is an attempt to escape from his obligations as a trustee for such personal representative. In disposing of this appeal we are not called upon, and therefore do not pass upon the question whether such an assignment is valid as between the surviving partner and the creditors of the firm. That question depends upon other principles, and, besides, no such creditor is a party to this action, and the plaintiff does not represent such creditors. We think, however, enough was shown in this case to justify the court below in making the order appealed from, appointing a receiver, and therefore the order should be affirmed, with the usual costs, to abide the event of the suit.

DANIELS, J., concurs.

Pakas agt. Racy.

N. Y. COMMON PLEAS.

SOLOMON L. PAKAS, respondent, agt. MARY RACY, an infant,
&c., appellant.

Replevin — When it cannot be maintained — Erroneous verdict not cured by judgment — An infant's contract voidable.

To entitle a party to maintain a replevin he must have had title to the property or the possession of it, or at least the right of possession.

Where the plaintiff's claim to the right of possession is founded upon an agreement alleged to have been made with the defendant, who is an infant, such alleged agreement being that if the horse, &c., was awarded to her she would give it to the plaintiff:

Held, that such agreement, if it had been made, was voidable, and the horse having been awarded to be delivered to her, the plaintiff, under such an agreement, had no right to the possession of it.

In a replevin suit the verdict of the jury should fix the value of the property at the time of the trial, as required by the statute. This omission cannot be supplied by the court by inserting in the judgment a sum of money as the value of the property.

General Term, June, 1885.

Before DALY, C. J., and ALLEN, J.

William A. Keeler and Jacob Gross for appellant.

Simon Greenbaum, for respondent.

ALLEN, J. — This is an appeal from a judgment rendered on the verdict of the jury in the district court of the city of New York for the seventh judicial district. This action, which is an action of replevin, was brought to recover possession of one black horse, saddle and bridle, to which the plaintiff claims title. The jury, under the direction of the court, returned a general verdict for the plaintiff, but did not assess the value of the property claimed nor award damages for its detention. On this verdict the court rendered judg-

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ment for the return of the property, and assessed its value at the sum of \$150.

The defendant received the property in question from the Olympian Club. It appears that the Olympian Club awarded it to her as a prize for the representation of the statue of the "Goddess of liberty enlightening the world," in which representation Miss Racy, the defendant, represented the goddess of liberty. The award by the committee of the Olympian Club, as appears from the testimony, was in this form: "Horse, saddle and bridle awarded to the Bartholdi statue, Miss Racy."

The plaintiff claims title to the property under an agreement alleged to have been made by him with the defendant that in the event of her winning the prize she would give the property to him. We think the plaintiff has no cause of action. The Olympian Club delivered the property to the defendant, and parted with its title to her for the purpose of conveying that title. The plaintiff never had title to the property, nor the possession of it, nor the right of possession. One of these conditions at least was indispensable to authorize the plaintiff to maintain a replevin.

The plaintiff's claim to the right of possession is founded upon an agreement alleged to have been made with the defendant, who is an infant, which agreement, therefore, is voidable at her election, and she did so elect, by pleading her infancy as a defense to the action (*Tyler on Infancy and Coverture*, p. 76).

The alleged agreement was that if the horse was awarded to her, she would give it to the plaintiff. She denied any such agreement, but if it had been made, it was voidable; and the horse having been awarded to be delivered to her, the plaintiff, under such an agreement, had no right to the possession of it.

Apart from the question of the right of the plaintiff to recover in this action, it is clear that the judgment is irregular. The verdict of the jury should have fixed the value of the

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property, at the time of the trial, as required by the statute. The court cannot supply the omission by inserting in the judgment a sum of money as the value of the property.

The judgment should be reversed, with costs.

DALY, C. J., concurred.

SUPREME COURT.

JAMES P. VAN WYCK agt. ADOLPH HOROWITZ.

Injunction — Trade-mark — The right of a party to use another's name upon his cards, &c., by saying "late with," &c.

A person who has been a hired workman of another, a mere employe for a time, afterwards engaging in the same business of his former employer and occupying a store in the same city, has no right to use the name of such former employer upon his cards, signs, &c., by saying "late with," &c., and such use will be restrained by injunction.

Ulster Special Term, June, 1885.

MOTION to continue injunction.

F. J. Collier, for plaintiff.

J. Rider Cady, for defendant.

WESTBROOK, J. — The plaintiff James P. Van Wyck, who is the owner of a watch and jewelry store and business in the city of Hudson, asks for the continuation of an injunction restraining the defendant Adolph Horowitz, who is the proprietor of a similar and rival establishment in the same city and in the same street, from using the plaintiff's name in and upon his advertisements and signs so as to draw to his own store customers and business from that of the plaintiff.

As to the substantial facts there is no dispute. The defendant in his answer admits and alleges "that the plaintiff above named occupies as a jewelry store in said city of Hudson the

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ground floor of a building upon Warren street in said city, which has been for many years last past used as a jewelry store and has a distinctive and well known repnte as such. That said building is next to a large and prominent structure known and used as a Presbyterian church, which stands to the east of plaintiff's said store facing a public square in said city, known as Central sqnare. That plaintiff had displayed at and for a long time prior to the commencement of this action upon the front of his said store a large wooden sign upon which are plainly painted the words James P. Van Wyck."

The defendant then proceeds to say that he never resided in Hudson prior to November 1, 1883, and that from that date to May 1, 1885, he was employed by the plaintiff as a workman upon jewelry and in the repair of watches. That he thus became acquainted with plaintiff's customers, many of whom do not know his name, and that to inform such customers and the public generally who it was that had opened a new store of a character similar to that kept by the plaintiff, he had in his cards and advertisements declaring his business, and upon a sign in his store placed the words "*late with James P. Van Wyck.*" It is this use of his name by the defendant which the plaintiff seeks to restrain.

It will be observed that the answer of the defendant makes no secret of his intent, which evidently is to connect himself with the reputation of the plaintiff and his business, and thus divert to himself a part of the patronage which the reputation of the plaintiff's establishment attracts to it. The statement of the case evokes instant condemnation from the hearer, and an analysis of the thoughts which produce such instantaneous conclusions will shrow that it rests upon sound legal principles as well as upon the conscience of the hearer.

The defendant concedes that the plaintiff's name is of value to the business of a jeweler and watchmaker in the city of Hudson. It is, and has been for many years displayed as a conspicuous sign, upon a conspicuous building, located in a central spot in the city, and made still more conspicuous by

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a large church facing a public square, in which the plaintiff carries on such a business. Conceding the value of that name, that of the plaintiff, to the business in which both of these parties are engaged, is its owner, who has given it such publicity by years of attention to his calling and pursuit, and by the expenditure of large sums of money in maintaining so expensive and conspicuous an establishment, in so prominent a point in the city of Hudson, entitled to its full benefit and value, or can the defendant turn a part of its benefit and value to himself by coupling it with that of his own?

The question is not difficult. That which belongs to a person is his own, and nothing is more completely the property of a man than his name. No person can use it without its owner's consent, and the use of that of the plaintiff's to make conspicuous the rival business and name of the defendant is as clear a violation of the property rights of the plaintiff as it would be for the defendant to take some article of personal property belonging to the plaintiff, a tall pole, for example, which will illustrate the act of the defendant, who uses the plaintiff's name to elevate and call attention to his own, and display upon it the name and business of the defendant.

The view thus expressed may at first be deemed radical, but it seems to me to be a clear deduction from fundamental principles. Of what avail is character or long continued business, large expenditure to make it known, and a name — more strictly and properly property than a trade-mark — if all can be turned, or partially turned, to another's benefit by tacking that name to or combining it with that of another individual so as to conspicuously advertise that to or with which it is so tacked or combined?

If the defendant, in his business cards, advertisements and signs, had used a trade-mark belonging to the plaintiff to advertise himself and a business of his own, which was a rival to that owned by the plaintiff which the trade-mark represented, the violation of the rights of the owner of the trade-mark

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would be conceded. The present case is stronger. The name of the plaintiff represents himself and his business only, and is even more fully and completely his than a trade-mark, and its use, therefore, by the defendant to give character to his own cannot be sustained. It is, unless its owner's consent has been obtained, just as unlawful as the wrongful using, as has been before stated, of another's personal property. The distinction between the two cases — the use is actual in both — is physical only. The one takes a physical object or thing, the other takes and uses not a physical object or thing, it is true, but a something which, though not tangible, is as really and completely property as the other. In short, the so-called radical thought is simply the enunciation and application of the fundamental principle that one man cannot lawfully take and use the property of another without and against the consent of its owner.

There is another thought in this connection which, though perhaps covered by the line of argument just presented, is still of sufficient importance to warrant a separate statement. The defendant in his answer also expressly concedes that "the jewelry store" owned by the plaintiff "has a distinctive and well known repute as such." This repute of his business is also clearly the property of the plaintiff, with which the defendant should not intermeddle. It has not a distinct physical form, it is true, as an article of personal property has, but its existence and power, nevertheless, are exhibited in results to be seen, and which are of great value to its owner. If the defendant helped by his service to build up the reputation of that store, the reputation thus acquired belonged to the plaintiff, who paid the defendant for the work and thus purchased all the reputation flowing therefrom. When the defendant, therefore, tells us that he wishes to appropriate a part of the reputation to himself by telling the public I was "with James P. Van Wyck," and therefore a part of the reputation is mine, he attempts to appropriate to himself something which does not belong to him, but which absolutely and completely is the

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property of the plaintiff, as much his as any article bought with his money or manufactured by his hands; and because it is the plaintiff's exclusively, and not his, the defendant cannot be permitted to appropriate it to himself at the expense of the plaintiff by the mode of advertising he has adopted.

The defendant's counsel, upon the argument of this motion, contended that the mode of advertising in use by the defendant cannot be restrained, because it only states a historical fact. The difficulty with the position is that it is untrue. The defendant in his advertisements does not tell the truth, as his counsel argued; and this fact makes another and further objection to the use of the plaintiff's name by the defendant. The advertisement is false and calculated to deceive, because it does not disclose the entire truth. The reader of the defendant's sign, card or advertisement, as he looks at the words, "*late with James P. Van Wyck*," will interpret them according to the notion which strikes his mind. He is not told that the defendant was the hired workman, the mere employe of the plaintiff, but that he was lately "*with him*," and is thus left to guess what the "*with*" means. The expression is, therefore, just as liable to carry the thought to the individual reading it that the defendant was "*with James P. Van Wyck*" as a *partner* as an *employe*; and, because it is as liable and likely to deceive as to tell the truth, and must, in fact, as often deceive as it makes a true narration, its use cannot be justified.

The case is not at all like that of *Morgan agt. Schuyler* (79 N. Y., 490), in which the parties had been partners under the firm name of "*Morgan & Schuyler*," and in which, speaking of the defendant, judge DANFORTH (*page 495*), said: "He may lawfully describe the rooms as 'formerly occupied by *Morgan & Schuyler*,' and himself as 'formerly' a 'late' of that firm." The difference between the two cases is that the defendant in the reported case had a property interest in the name and business reputation of the former firm, of which he was one, and the mode of advertisement suggested would

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have told the whole and exact truth ; while in this the defendant has no right of property in the name nor in the reputation of that business which he seeks to use with his own name and business, so as to give his own prominence at the expense of the other ; and in its use he so tells what his counsel calls the history of his life as to carry an untruth and to deceive as often as it tells the truth and narrates actual history. If the defendant had been a stove blackener, or hostler, or an errand boy in the employ of the plaintiff, or a clerk discharged for want of fidelity or competency, he could with just as much truth advertise himself as "late with James P. Van Wyck." The extreme supposed cases are put to illustrate the danger of the counsel's position. It cannot be that a man who has sustained any position towards, or had any employment from a well-known individual, that thereby he obtains the right to use that name in connection with his own so as to advertise himself and his business at the expense of his former patron and employer, and to do it in a manner which is likely to, and often must, deceive as to the nature of the relations to him. The motion to continue the injunction must be granted, because :

First. The defendant is without authority using the plaintiff's name, which is the use of another's property for his own benefit and to the injury of its owner.

Second. He is attempting to transfer to himself a part of the reputation of the store and business of the plaintiff, which also belong to the plaintiff as really and as truly as his name, or the personal property of which he is the actual owner.

Third. The mode and manner of the use by the defendant of the name of the plaintiff are such as oftentimes to deceive, and because liable to deceive, and thus benefit the defendant at the expense of the plaintiff, such use must be held to be unlawful.

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N. Y. COMMON PLEAS.

In the Matter of SAMUEL J. LOWELL, an imprisoned debtor.

Judgment debtor—Discharge from imprisonment—Meaning of "just and fair" as used in statute—When discharge will be denied.

A judgment debtor is not entitled to a discharge from imprisonment under execution, where he has knowingly and intentionally expended upon himself and family for the necessities and luxuries of life the money which he obtained by fraud from his creditors.

Held, also, that an investment by the debtor in real property in his wife's name, of other moneys subsequently acquired, is in fraud of the creditor, and will defeat a discharge on the ground that the proceedings are not just and fair.

A pretended indebtedness to the wife for borrowed money, where no account thereof has been kept, is no consideration for such investment as against creditors.

Special Term, August, 1885.

APPLICATION by Samuel J. Lowell for discharge from imprisonment under execution against his person, at the instance of Jason S. Hoffman.

Jacob Fromme, for petitioner.

Edward P. Wilder, opposed.

VAN HOESEN, J. — *In the Matter of Fink* (59 How. Pr., 145), judge VAN VORST decided that the proceedings of the imprisoned debtor had not been just and fair, because he had spent upon his family the proceeds of property that had, to his knowledge, been obtained by theft from the judgment creditor. The debtor himself had not committed the theft, but he had been informed of it before he used the avails of the property for the support of his family. The learned judge was of opinion that an imprisoned debtor who knowingly appropriates to his own use the property of which his

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judgment creditor has been deprived by embezzlement, should be deemed guilty of disposing of that property with intent to injure and defraud the creditor, though the use that he makes of it would be perfectly innocent if the property were honestly his own. Judge VAN VORST in giving his opinion, referred with approval to the decision of judge J. F. DALY in the *Roberts case* (59 *How. Pr.*, 136), in which judge DALY had given with great clearness and force his construction of the meaning of the words "if the proceedings of the debtor are just and fair."

In the *Matter of Fowler* (8 *Daly*), I followed the decision in the *Roberts case*, though I said that I thought judge DALY in the *Roberts case* had, in some *obiter* observations, misconceived the meaning of the statute.

In my opinion, an imprisoned debtor, who had never received any part of the property that the judgment creditor had lost through larceny and fraud, could not be said to have disposed of that property with intent to defraud the creditor. The rule with respect to debtors who had actually received the property of the judgment creditor or its avails was, in my opinion, different; for a disposition of such property with intent to defraud the creditor might fairly be inferred when the debtor used it for his own purposes, and in such a way as to place it beyond the reach of the creditor. The fraudulent disposition of the property which the law was intended to punish must take place after the property has passed under the control of the fraudulent debtor. Though the demand upon which judgment was recovered were a debt fraudulently contracted or a claim for damages for deceit, the discharge of the debtor from imprisonment under an execution could not be denied, unless it were shown that he had at some time made away with his property with intent to benefit himself or his family in the future, or with intent to injure and defraud the creditor. The property may be disposed of before the judgment creditor knows that he has been defrauded, and before he contemplates bringing an action, but in order to bar a dis-

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charge property must be disposed of by the debtor, and that property must be his own.

In the curious case of *Suydam* agt. *Belknap* (20 *Hun*, 87), the general term of the supreme court held that if a trustee embezzled the trust estate, he acquired no title to it, and consequently it was not his own property that he disposed of when he appropriated the trust fund to his own use; and for this reason they held that a discharge could not be denied to a trustee who had converted the trust estate to his own purposes. It may be a question whether a thief should be permitted to escape punishment by alleging that he did not acquire a valid legal title to the goods he stole. And it may also be a question as to whether the trustee *Belknap* did not have a legal title to the estate he held in trust. But, waving those matters, it seems to follow from the reasoning of the supreme court in *Suydam* agt. *Belknap*, that if *Belknap* had acquired the title to the property he would not have been discharged, though he had lost the property or spent it before he was arrested, so that it was no longer in his power to surrender it to the judgment creditor.

The difficulty in these cases is to discover the intent with which the debtor has disposed of his property. There is not in my opinion a conclusive presumption in all cases that the debtor who obtains property fraudulently has fraudulently disposed of it because he is not able at the time he applies for his discharge to surrender it to his creditor. If by inevitable accident, or without fault on his part, he has been deprived of the property, it cannot be said that he has disposed of it. But if it appears that he has disposed of the property, the question arises, with what intent? In answering that we apply the rule that a man intends the obvious consequences of his own acts; and the court must draw its conclusions as to the intent from the facts that are in evidence. If a debtor uses the money that he obtains by fraud in maintaining himself and his family, knowing that the creditor must be the loser, may not the courts infer that he disposed of that

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property with intent to injure and defraud that creditor? Of course there may be circumstances that may show that the debtor's intentions in disposing of the property were not dishonest, and that he had no good reason to believe that the creditor would suffer, though the property were disposed of. Such cases may perhaps occur, and when they do the court will deal with them. But the statute ought not to be so construed as to permit the thief and the swindler, after spending fourteen days or ninety days on the jail limits, to snap his fingers at the victim, and say: "It is true that I spent the money of which I defrauded you in getting the luxuries and the necessities of life, but I have not kept any of it, nor have I made any of it for my family or for myself. The use of your money for my gratification does not prove that I disposed of it with fraudulent intent, and you cannot, if you would, prevent my discharge."

Applying to this case the rule that I think controlling, the discharge must be refused. Lowell obtained Hoffman's money by false pretenses, and spent it, intending that Hoffman should lose it and be injured by the loss. Again, he received other moneys which he used in buying property in the name of his wife. He and his wife are residents of New Jersey. They were formerly residents of Massachusetts. Lowell says that in Massachusetts he reduced to possession certain moneys that belonged to his wife. Those moneys he used as his own. Years afterwards he moved to New Jersey, but conducted business in New York. Subsequent to the incurring of his liability to Hoffman he obtained a considerable sum of money. This money he invested in New Jersey, in the name of his wife. He says he did so because he wished to repay to her the money that he had received on her account in Massachusetts. I see nothing to warrant the belief that he considered himself his wife's debtor before he determined to invest his suddenly acquired money in her name. He says that his wife sometimes did not know at what times he received the moneys that belonged to her. He took them without objection on

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her part, and used them as his own. When he invested these moneys in her name he left himself without the means of paying his debts. Such a provision for the wife, under such circumstances, even though the purpose of the husband was to reimburse his wife for money of hers that he had used in supporting her and himself, seems to me to be making over property "for the future benefit of himself and his family."

The discharge should be denied.

CITY COURT OF NEW YORK.

DOUGLASS agt. MACDURMID, as receiver.

Costs—What to be allowed on offer of judgment for a specific sum, with interest and costs—Code of Civil Procedure, sections 3251, 420, 788.

In an action upon contract, where the amount due is capable of computation, and may be easily ascertained in that way, and the defendant serves an offer of judgment for a specific sum, with interest and costs; and after the offer is made both parties serve notice of trial, after which time the plaintiff accepts the offer, he is only entitled to costs before notice of trial—fifteen dollars. No application to the court was necessary, and but fifteen dollars are recoverable.

Where the action is against a receiver, and the plaintiff has to obtain leave to sue the receiver, he is not entitled to costs as upon application to the court.

Special Term, July, 1885.

MOADAM, C. J.—Section 3251 of the Code provides that costs awarded to a party to an action must be. * * * To the plaintiff: For all proceedings before notice of trial, in an action specified in section 420 of the Code, fifteen dollars. Section 420 provides that "judgment may be taken without application to the court where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or

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capable of being ascertained therefrom by computation only." The present action is on contract, and the amount due is capable of computation and may be easily ascertained in that way. The defendant has served an offer to allow judgment for a specific sum, with interest and costs. Upon filing the summons, complaint and offer, "the clerk must enter judgment accordingly" (*Code, sec. 738*). So that under these various provisions no application to the court for judgment was necessary, and but fifteen dollars costs are recoverable. True, the plaintiff had to obtain leave to sue the receiver, but this was a preliminary step to bring the action, and while leave was necessary to enable the plaintiff to sue, it in itself furnished no cause of action, if none existed without it, and it did not change the character of the action nor the rules of practice which regulated it when once properly commenced.

I was inclined to think that the plaintiff ought to have the costs as upon application to the court, because he had to obtain leave to sue, but the language of the Code above cited will not bear that construction. After the offer was made, both parties served notice of trial, and the plaintiff who has since accepted the offer, charges fifteen dollars for this service. But it seems to me that he is not entitled to it. If the offer is accepted, it is with costs to the time of the service thereof, excepting those disbursements which necessarily follow the acceptance of the offer (*Henderson agt. Bannister, 1 City Ct. R., 125*). In other words, the plaintiff was bound either to accept the offer as of the day when it was made. Acceptance by him is inconsistent with the idea of a trial which could be had only on the theory that the offer was rejected, and that the plaintiff had elected to take the chances of a more favorable recovery.

The notice of trial served by the defendant does not aid the plaintiff, because the offer prevented the defendant from moving the case for ten days after it was served (*Walker agt. Johnson, 8 How. Pr., 240*), and the notice served by the defendant became nugatory on the acceptance of the offer.

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True, the offer did not stay the plaintiff, for it does not prevent a plaintiff from taking an inquest if the cause is reached within ten days after the offer is served (*Hawley agt. Davis, 5 Hun, 642*). But the taking of the inquest would be tantamount to a rejection of the offer, which is not to prejudice the defendant if not accepted (*Sec. 738*). The fifteen dollars costs allowed for "all proceedings after notice and before trial" is to compensate the attorney for the incidental labor preliminary to a trial, such as filing the note of issue, searching and watching the calendar, and to compensate for the drawing and service of the notice of trial when one is necessary, but not otherwise. The acceptance of the offer is conclusive proof that no notice of trial was necessary in this case.

Upon the entire facts, therefore, I have concluded that the taxation by the clerk, in so far as it allows fifteen dollars as costs before notice of trial, must be affirmed, but in so far as it allows fifteen dollars for proceedings after notice of trial it must be reversed.

SUPREME COURT.

In the Matter of the Judicial Settlement of the Account of
ELLA D. GOODRICH, as sole acting executrix and trustee
of JOHN W. SMITH, deceased.

Executors, administrators and trustees — Their commissions.

Full commissions should be allowed executors or trustees on receiving and paying out the income, notwithstanding the trustee has received full commissions on a former accounting for receiving and investing the principal.

First Department, General Term, July, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

Matter of Goodrich.

APPEAL by the executrix and trustee from portions of the decree of the surrogate entered upon her annual accounting.

Crane & Lockwood, for appellant.

E. T. Bartlett, for respondent.

DAVIS, P. J.—Two questions are presented on this appeal: First. Whether the appellant is entitled to full commissions as trustee on the income for the period covered by the accounting at the rate of five per cent on the first thousand and two and a half per cent on the remainder. The surrogate allowed her but one per cent on the whole. Second. Whether she is entitled to commissions as executrix on the amount of proceeds of sales of certain real estate in Charleston, S. C. The surrogate allowed her half commissions as trustee on receipt of such proceeds. On the second of these questions we are of opinion that the decision of the surrogate is right.

As to the first of these questions, the surrogate declined to follow the decision of the court of appeals in the case of *Hancox* agt. *Meeker* (95 N. Y., 528), claimed by the appellant to be controlling, on the ground that that case is so far distinguishable from the present as not to be controlling. In this we think the learned surrogate was in error. As we understand the decision of the court of appeals in *Hancox* agt. *Meeker*, it determines that where an annual income is required to be paid periodically to a *cestui que trust*, the trustee has a clear right to retain commissions from the annual income; and that where an account is rendered yearly in compliance with any statute, rule or order of the court, or where annual rests are necessary to charge the party accounting, with interest, on the balance remaining in his hands, such accounting party is entitled to full commissions on each year's receipts and disbursements. The court in that case distinctly declared that "no sound reason exists why a trustee should not be entitled to receive commissions on the income of an estate which he annually pays over and accounts for."

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If this be so, we see no sound reason why the rule should not apply so as to allow full commissions on receiving and paying out the income, notwithstanding the trustee has received full commissions on a former accounting for receiving and investing the principal. It is not necessary to express any opinion as to which is the better law — the decision of the court of appeals or the rule laid down by the surrogate in his opinion — because the former is necessarily controlling of our action.

The decree of the learned surrogate must, therefore, be so far modified as to allow full commissions upon the income received and paid out, and with such modification affirmed, without costs to either party.

DANIELA, J., concurred.

N. Y. COMMON PLEAS.

WILLIAM J. BANNERMAN, plaintiff and respondent, agt. JOHN E. QUACKENBUSH *et al.*, defendants and appellants.

Amendment of pleadings — When and to what extent allowed — Code of Civil Procedure, sections 451, 1982, 1984, 1985 — Factors — Who are — Distinction between brokers and factors and their rights and liabilities — Offset.

The court may on the trial allow the pleadings to be amended by striking out the words "and son" in the title of the action and inserting in place thereof the name of the son.

Where a broker has possession of goods to be sold, and sells them in his own name, he is a factor, and any offset existing against the latter may be set up to a claim made by the true owner of the property to recover the contract-price, provided the vendee purchased in good faith and without notice of the true facts.

The distinction between brokers and factors and their rights and liabilities, considered.

Perhaps, in the case put, the true owner might reclaim his goods from the vendee, if the right to do so is exercised within a reasonable time. But the right may be lost by delay or by bringing an action to recover the price.

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General Term, June, 1885.

Before DALY, C. J., LARREMORE and VAN HOESEN, JJ.

M. L. Hollister, for appellants.

A. T. Johnston and E. J. Phillips, for respondent.

DALY, C. J. — The court had jurisdiction to allow the words "and son" to be stricken from the title and to direct that the name of Abraham Quackenbush be inserted. The action was brought against the defendants as copartners; and where that is the case the Code provides (*sec.* 1932) that if the summons is served upon one or more, but not on all the defendants, the plaintiff may proceed against the defendant or defendants served, unless the court shall otherwise direct, and if he recovers make the final judgment against all the defendants jointly indebted, upon which judgment the execution issues in form against all the defendants (*secs.* 1934, 1935), but is not enforced against a defendant who has not been served with the summons, except that it can be collected out of the property jointly owned by him with a defendant who has been served. The answer in this action is by J. E. Quackenbush, one of the partners, from which it may be assumed that he was the only one served in the action; and the amendment appears to have been made for the purpose of having the name of both parties inserted in the summons and complaint instead of J. E. Quackenbush and son, as it was in the summons and complaint, which amendment may be made under section 451, and which in fact the court under the Code, when the true name becomes known, orders to be made upon such notice and such terms as it may prescribe. The cases to which the counsel for the appellant refers are cases where a new defendant is sought to be brought in merely by an amendment, which can be done only by service upon him of a supplemental summons, or, in other words, where defendants are attempted to be added without the service of process

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by simply amending the pleadings, which cannot be done. Such was not the nature of the amendment here. It did not, and could not, authorize an individual judgment against Abraham Quackenbush, the judgment in the action being one that could be collected only out of the property jointly owned by him and the partner who had been served.

Before passing upon the exception taken to the judge's charges, it will be necessary to consider the case presented by the evidence. It appears that the firm of J. E. Quackenbush & Son, who are hardware merchants, had an order from Italy for thirty shears, an article manufactured by the Renz Hardware Company, a manufacturing company at Bridgeport, Connecticut, having an office for the transaction of business in this city. The defendants sent a letter to the company's office, asking at what price they would supply the quantity of shears wanted, payment to be made in ten days. This was followed by further correspondence, until finally J. E. Quackenbush & Son sent a letter stating that the company might furnish the shears required at the company's price; and the company on January 26, 1883, delivered the shears at the store of J. E. Quackenbush & Son, with a bill made out in the name of the Renz Hardware Company, in which it is stated that the articles which are enumerated in the bill were sold to J. E. Quackenbush & Son, "terms cash within ten days from date." This is the transaction as it appears by the documentary evidence — that is, the letters between vendor and vendee and the bill delivered with the goods — and it agrees with the other evidence given by the defendant; but the account of the transaction given by the plaintiff's witness Schram conflicts with this documentary evidence. He testifies that on January 25, 1883, the day before the goods were delivered, he went to the defendants' store, where he saw Abraham Quackenbush, the son, and told him that the company could not give ten days' time; that the defendants could have the shears, but not without cash upon delivery; that Abraham Quackenbush said that they could not do that; that

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the shears were for export; that he did not want to pay the money before he got it from his customer, and to send the goods to them on Thursday; that they would then send the bill to the office of the company and have it signed, and on Saturday following they would go to their bank and get the money, and that the company might send up about noon on that day and get a check for the amount of the bill. The bill delivered on the following day with the goods, however, states the terms to be cash "within ten days from date," and whether the terms of the sale were cash on delivery, modified by an understanding that payment might be made the day after the delivery, or the terms were cash within ten days, as stated in the bill of parcels, was a question for the jury.

Whatever may have been the fact in this respect, it appears that before making the purchase Abraham Quackenbush bought for \$100 of one W. F. Swords, of Connecticut, a promissory note of the company for \$467.51, given by the company to Swords for goods received, and which note, when purchased by Quackenbush, was past due, and had been protested for non-payment.

Quackenbush testified that he bought the note for \$100, intending to use it in payment of the bill for the shears, thinking, as he said, that "if he could make any money by it, well and good." That his object in buying the shears was that "he had a place to put them," and that if he had "no where to place them" he would have bought neither them nor the note. On the morning after the delivery of the goods the attorney of the defendants went to the office of the company, and, seeing the treasurer, told him that he came to pay the defendants' bill and offered in payment of it the \$467.51 note and the residue of the amount in cash. The treasurer refused to take the note, said that the goods did not belong to him and that he wanted the cash as had been agreed upon. The treasurer, as the attorney testified, was very angry, declared that it was substantially a fraud, and spoke of an arrest, and about an hour after, he sent Schram, the clerk, to

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the defendants with a bill for the shears, made out in the name of the Renz Hardware Company, but having at the end of it a direction to the defendants to pay the amount to the plaintiff. Schram saw the elder member of the firm, J. E. Quackenbush, and presented the bill to him, who said "we have made payment in another way before this." Schram said that they knew that, but that they did not want to receive the note in payment of the goods; that they wanted cash, stating that the goods belonged to the plaintiff. Schram said something further about an arrest to which Quackenbush replied: "Well, go ahead; we are prepared." These 300 shears formed part of a 1,000 shears which the plaintiff about ten months before had bought of the Renz Hardware Company, who were the manufacturers of them; there was no question in the case as to the integrity of this purchase. The 1,000 shears were delivered to the plaintiff at his place of business in Brooklyn; he gave his checks for them, which checks it was shown had been paid. When the Renz Hardware Company received the order for the goods, they inquired of the plaintiff if he had them on hand, advising him of the order they had received, and he replied that he would fill the order and pay the company a commission upon the sale, but that he did not want to give any time, and it further appeared that the goods were taken from the Renz Hardware Company's office in this city when they were delivered to the defendant. Upon this state of facts, the judge charged the jury that if they found that the plaintiff owned the property, but that the defendants had no notice whatever of the fact, but acted in good faith without knowledge, notice of the plaintiff's title or of any circumstance calculated to put them upon inquiry, the jury should allow as an offset to the plaintiff's claim the note for \$467.51 with interest, and render a verdict for the plaintiff for the balance then remaining, and in concluding his charge finally instructed the jury as follows: "If the defendant J. E. Quackenbush had knowledge on the day he received the goods, or the day following, that the goods belonged to the plaintiff

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and not to the Renz Manufacturing Company, he might have said, if that be so the plaintiff may come and take his goods away, I don't want them, I bought them, supposing they belonged to the Renz Manufacturing Company, against whom I have an offset. If, however, the defendant did not see fit to exercise his legal right, and with knowledge and notice that the property was the plaintiff's, and the defendant had it in his power at the time to return the property, he is liable for the contract-price," to which part of the charge the defendant excepted. It is a well settled rule that where a factor sells goods as his own, and the buyer having no knowledge that he is acting as a factor, has a right to assume that he is the owner, that such a buyer in an action brought by the principal for the price, may set off any demand which he has against the factor. In the earliest reported cases in which this rule is found (*Rabone agt. Williams*, 7 T. R., 360, note a), it is thus broadly stated by lord MANSFIELD: "Where a factor acting for a principal delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as a principal, and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet the purchaser may offset any claim he may have against the factor in answer to the demand of the principal." Baily says that this rule "is built upon the principle that where the buyer has been led to contract under the impression that his contract is with one person he cannot afterwards be defrauded of the rights which he had against that person by the introduction of a third to whom he was a stranger" (*Baily on Principal and Agent*, by Loyd, p. 327).

Story declares that the ground of this doctrine "undoubtedly is that where any person holds himself out as a principal with the consent of the owner, third persons who deal with him *bona fide* are entitled to all the rights which they would have if he were the real principal" (*Story on Agency* [2 Am. ed.], 390). And justice CHAMBERS, in *Houghton agt. Mathews*

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(3 *Bos. & P.*, 490), and chief justice NELSON, in *Mitchell agt. Butel* (10 *Ward*, 495), approve of the reason which is given for the rule in *Culler's Bankrupt Laws*, that the parties by their conduct having enabled their agent to gain credit as the sole owner, and the buyer having contracted with him *bona fide* in that character, they cannot recover against the buyer without allowing him the same advantages and equities in his defense that he would have had against their agent.

As indicated in the statement of the rule, it does not apply where the buyer knows that the seller is not the owner; or where the circumstances are such as should put him upon inquiry especially when the facts might easily have been ascertained, and he must be regarded as negligent in not making the inquiry (*Baring agt. Corry*, 2 *B. & Ald.*, 137; *Young agt. White*, 7 *Beav.*, 506; *Meel agt. Brothers*, 10 *Wend.*, 495, 496; *Hogan agt. Stroub*, 24 *id.*, 458; *Bliss agt. Bliss*, 7 *Bosw.*, 339; *Judson agt. Stillwell*, 24 *How.*, 553). And in applying the rule a distinction is recognized between a factor and a broker, because factors have the possession of goods upon which they usually make advances, and having a special property in them, have authority to sell them in their own name; whereas the broker has not possession of the goods, the purchaser is not deceived by that circumstance, and as the employment of a broker gives him no authority to sell the goods as his own, he cannot bind his principal if he does so (*Baring agt. Corry*, 2 *B. & Ald.*, 144).

The first question which this case presents is, what was the effect of the delivery of the goods upon the representations made to the broker on the delivery of them, assuming it to have been made as stated by the plaintiff's witness. This question arises in *Chapman agt. Lathrop* (6 *Cow. R.*, 110), a case in many of its features resembling the present one. In that case the defendant went to the plaintiff's store and inquired for certain articles, and, being informed that the plaintiff had them, the defendant requested that they might be put as low as possible, as they would pay for them in

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cash, upon which the plaintiff said that if they were to be paid for in cash he would sell them as low as he could, and upon the same day they were delivered to the defendant, who took them to his store upon carts, and upon the next day the defendant's clerk called on the plaintiff and tendered a protested note indorsed by the plaintiff, and offered to pay the balance in cash. The plaintiff refused to receive the note, and about a fortnight after demanded the property, which the defendants refused to deliver. The plaintiff brought trover, and it was decided that the action could not be maintained. The court held that if there was a fair contract for the goods and they were delivered to the purchaser without any fraudulent contrivance on his part to obtain possession, the property passed, and that the plaintiffs' remedy was an action for the price. Where the agreement, said chief justice SAVAGE, is to pay down for goods and the vendor delivers them without actual payment, the vendee may avail himself of any legal set-off, notwithstanding that the agreement was to pay ready money, and that there was no fraud under the circumstances above stated in paying the plaintiffs with their own paper. In *Hogan agt Short* (24 Wend., 458), the action was brought to recover for goods sold. It appeared in this case that one Morris, who was the agent of the plaintiff, sold the goods to the defendant without disclosing the name of the principal. The sale was for cash or for payment in from two to six days, which was deemed a cash sale. Morris, the agent, had stopped paying twenty days before the sale, a fact that was notorious, and when the sale was made the defendants held Morris' note for a larger amount than the price of the goods; but which note had not yet matured. Morris called twice upon the defendants for the cash, but was told by them that they were short of funds. About twenty days after the sale he called again, when they told him that they thought he ought to let the claim go against his note which was then coming due. He replied that he had no right to do so, that the goods were not his, that the

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owners lived in Baltimore, and that he must get the money. He testified further that he was a commission merchant, which was upon his sign; that if the defendants did not know it, every one else did, and that he had no doubt that they knew that he had stopped payment before the sale; and evidence was given tending to show that the defendants made the purchase with the intent to set off the note instead of paying cash, according to the contract. The court, after a very full review of the decisions under the rule before stated, from the earliest report of it in *Baylone agt. Williams (supra)*, held that under the circumstances stated the set-off must be allowed, and the judgment in favor of the plaintiff was reversed.

Bronson, J., who delivered the opinion of the court, said that it might be an open question whether the vendor, immediately after the delivery and when he first discovered that the vendee does not intend to pay cash, may not disaffirm the sale and bring trover for the goods if they still remain in the hands of the vendee; but that, whatever may be the fraud, if the goods are actually delivered in pursuance of a contract of sale, the vendor may elect to affirm it; and that he does affirm it if there be any considerable delay in requiring a return of the goods after the discovery of the fraud, or where, as was done in that case, he brings an action for the price. The judge held, further, that the fact that Morris was a commission merchant had little or no tendency to prove notice, because he was also a trader on his own account; that the fact that he had stopped payment proved nothing, because after the happening of that event he would be as likely to sell his own goods as he would goods which a third person had previously intrusted to him; that the fact that the defendants intended to set off the note which they held against him tended to show that they believed that Morris was the principal, for otherwise they could hardly hope to accomplish their object; that it made no difference that the defendants bought the goods from Morris for the very purpose of obtaining payment of their debt against him, and that upon the facts stated

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defendants were entitled to a verdict. He said it would not do in such a case to guess that the vendee had notice, but that it must appear from the nature of the transaction, or by something that transpired before the contract or sale was completed, that the vendee had good reason to believe that he was dealing with an agent, and that in a commercial community no rule short of this would afford sufficient protection. It appears to me that these questions arise upon the facts in this case. The transaction upon the part of the defendants is not, it is true, one that commends itself to the favorable consideration of the court. The offset was not one arising out of any transaction between the defendant and the Renz Hardware Company, but the defendants, after they had obtained an order for a certain quantity of an article which that company manufactured, and from whom they meant to purchase it, went and bought a depreciated paper of the company at the enormous discount of seventy-nine per cent, that they might make \$367 out of an order for goods for which they were to pay but \$522, and when ascertaining, according to the plaintiff's witness, that the company would not, at the price agreed upon, give any time, but wanted, as the witness expressed it, "spot cash payment upon delivery," the defendants, to secure a delivery, practiced the artifice of representing that they did not want to pay cash until their customer had paid them, coupled with the promise that when the bill of lading, as I understand the testimony, was signed, they would give the company their check for the amount of the bill. But notwithstanding these circumstances I think, upon the authorities, that if the defendants had the right to assume when they made the contract for the purchase of the goods that the company were the owners of them, they had the right in this action to set off the note as a valid demand which they had against the company. It was notwithstanding held, as has been stated in *Hogan agt. Shroub (supra)*, that although the buyer when he agreed to pay cash intended to pay for the goods with the note that he held of the factor, that that would

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not affect his right to set it off in the action brought by the principal for the price of the goods, the note being then due; and that this is the law appears also by the cases of *Eland agt. Karr* (1 *East*, 375), *Comfort agt. Rivett* (2 *M. & Sel.*, 510), *Schmer agt. Hawkins* (2 *Esp. N. P.*, 626), *Downer agt. Eggleston* (15 *Wend.*, 51). For the set-off is a legal right, and may be insisted upon even where an express promise has been made to relinquish it (*Downs agt. Eggleston, supra*; *Taylor agt. Okey*; 13 *Ves.*, 120).

One of the early cases in which a set-off of the vendor's paper in an action brought for the goods was not allowed (*Fair agt. McIver*, 16 *East*, 130) resembled the present case in the feature that the paper of the vendor was obtained for the purpose of using it in payment for the goods bought; but the case is distinguished from the present in the circumstance that the purchaser there was not the *bona fide* owner of the bill of exchange which was offered to the acceptor in payment for the goods bought, but was acting for the benefit of the real owners, one of whom, knowing that the vendor had not been regular in his payment, informed defendant, who made the purchase, that he was in doubt as to the acceptor's affairs, and upon his solicitation and suggestion, defendants undertook to secure the payment of the bill by purchasing goods of the acceptor; after the delivery of them offering the bill in payment, which he refused to take. The acceptor shortly afterwards failed, and in an action brought by his assignee against the defendants to recover for the price of the goods, it was held that the defendants could not set off the bill against the acceptor's assignees, as they were not the holders of it in their own right, but merely held it as trustee of the real owners. "As such trustees," says BAGLEY, J., "they could not set it off against a demand upon them in their own right." Lord ELLENBOROUGH went beyond this, declaring that he was not satisfied with the previous decisions of lord KENYON in *Eland agt. Cor* (1 *East*, 375), that upon the sale of goods for ready money the condition is performed by offering in payment the

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vendor's own paper, but in subsequent cases his view was not concurred in, but that of lord KENYON was held to be the law (*See the cases in Hillard on Sales* [3d ed.], 239).

Where the agreement is to pay cash, there is no reason why the vendor should refuse to receive his own paper, if it is due, as equivalent to cash, and it has been so held (*Mayer agt. Mias*, 8 *Moore*, 275; 1 *Bing.*, 311). There is not in such a case that fraud which exists where a contract is made for the purchase of goods for cash and possession of them obtained with a preconceived intention not to pay for them.

What appears in the present case is, that upon a sale of goods a delivery of them was obtained with a preconceived intention to pay for them in the depreciated paper of the vendor, which had been bought for that purpose, and does not amount to a connivance (*Mayer agt. Mias*, 8 *Moore*, 275; *Id.*, 1 *Bing.*; *Kennet agt. Robinson*, 2 *Id. Marsh. [Reg.]*, 84; *Hillard on Sales* [3d Ind. ed.], 309-405; *Wells on Replevin*, pp. 399-551). For the goods being delivered upon the promise to pay cash upon the Saturday following, the possession in the first instance was lawful, and the plaintiff being the owner of the goods, as he had authorized the sale of them only for cash, was entitled to a restoration of them on the breach of that condition, then a demand of them of the defendant and a refusal on their part to give them up was necessary before an action could be maintained for a conversion, or, more properly, for the wrongful detention then of the goods (*Hall agt. Robinson*, 2 *N. Y.*, 295; *Addison on Torts* [3d ed.], 312).

But there has been no demand for the restoration of the goods, but a demand only, as in *Chapman agt. Lathrop* (*supra*), for the purchase-money. At least there is nothing in the evidence to show how any demand has ever been made for the restoration of the property by the plaintiff, or by any one in his behalf. The complaint appears to have been framed with a view of recovering as in an action for tort. It first avers a sale and delivery of the goods for cash, payable the

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day after the delivery, a demand of payment and a refusal. It then avers that the plaintiff was induced to deliver the goods by deceit, trick and device, practiced upon him by the defendant. It sets forth the representations of the defendants, upon which he was induced to deliver the property, which it avers were false and made with the fraudulent intent to obtain the goods without paying for them, and demands judgment for \$535.38, which is the price of the goods, with interest.

The evidence could not sustain this complaint, for it was not shown that the representations were made with a fraudulent intent to obtain the goods without paying for them, but with an intent to pay for them chiefly in the protested paper of the vendor and supposed owner, which, as I have said, is not a conversion. The complaint shows that the possession which the defendants obtained was lawful, as it avers a delivery under an agreement to pay the cash for them upon the following day. It avers a breach of that payment by a refusal to pay cash and the setting up of a pretended claim as an offset against the plaintiff's bill, but there is no averment that the plaintiff had rescinded the contract or demanded a return of the property, and that the defendant had refused to restore it, which was essential to sustain an action for a wrongful detention, the taking having been lawful.

The only action that was maintainable, therefore, under the complaint, was an action for the sale and delivery of the goods, and as that affirms the contract of sale, the right of set-off exists unless the defendants knew when they made the contract that the Renz Hardware Company were the owners, but were acting as factors, or the circumstances were such as should have put them upon inquiry, and there was nothing in the evidence to warrant such a finding. The shears had been manufactured by the company, and the defendants, therefore, having ordered a certain quantity of an article of the company's manufacture, and the company having in the correspondence that ensued, and in a bill delivered with the

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goods, acted as principal, the defendants had a right to assume that the company were selling an article of which they were the manufacturers and owners.

The plaintiff having, when advised of the order, sent the shears to the company's place of business in the city, made them his factors in the sale by delivering the goods into their possession, thereby enabling them to sell and deliver them in their own name. By this he brought himself within the operation of the rule referred to, for under these circumstances the company cannot be regarded as brokers employed to sell the property, and exceeded their authority by selling it in their own name.

There is nothing in the case to show that the defendants had any intimation that the shears belonged to the plaintiff, or that there was nothing that should have put them upon inquiry, and as they had in their possession at the time of the sale and delivery an indorsed note of the company's which was past due, they had the right, regarding the company as principals in the transaction, to tender it in part payment or to set it off in an action brought for the price. There would be no doubt of this if the Renz Hardware Company were the owners of the goods, and it is the same where the company acted as owners and the buyer knew them only as such up to the time when their note was offered to them in part payment for the goods.

It may be that the plaintiff had the right to rescind the sale under the circumstances — a point upon which I express no opinion — and bring an action for a conversion or wrongful detention on the defendants refusing to give up the property upon demand when they were advised of the plaintiff's ownership, but he made no such demand and can maintain no such action. The action which he has brought is maintainable only as an action for the recovery of the contract-price which necessarily affirms the sale and entitles the buyers to their set-off. A demand is not required where it is apparent from the conduct of the person who has the goods that it would be nee-

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less; but that does not appear here. All that appears is when the company's clerk said to one of the defendants something about an arrest, he replied "well, go ahead; we are prepared," which must be understood as applying to the threatened arrest and cannot, as matter of law, be declared sufficient to hold that a demand was necessary.

Upon the review of the facts and the law, it appears that the charge of the judge was erroneous in instructing the jury that if the defendants had knowledge or notice on the day they received the goods, or on the day following, that the property was the plaintiff's, and that they then had it in their power to return it, that they were liable for the contract price; or, in other words, that they could not set off the note in the action for the price of the goods.

There must, therefore, be a new trial.

Judgment reversed, new trial ordered, costs to abide the event.

LARREMORE and VAN HOESEN, JJ., concur.

SURROGATE'S COURT.

In the Matter of KING, minors.

Guardian—Limitation of the surrogate's authority to remove testamentary guardian—Code of Civil Procedure, sections 2472, 2817, 2832, 2858.

One who is a lawful incumbent of the office of guardian, either by appointment of the surrogate or by virtue of a testamentary provision, can successfully resist in this court an application for his removal until such facts and circumstances have been established as furnish statutory warrant for his suppression.

If, within the meaning of subdivision 2 of section 2817 of the Code of Civil Procedure, a guardian has been guilty of "misconduct in the execution of her trust," and has thereby become "unfit" to be continued in her office, she must be removed; otherwise the surrogate is powerless to displace her.

New York county, July, 1885.

Matter of King.

ROLLINS, S. — This proceeding is brought by Donald Mackay, as one of the executors of Elizabeth R. B. King, deceased, for the removal of Phebe Fullerton, the testamentary guardian of Mrs. King's children.

It is provided by the seventh subdivision of section 2472 of the Code of Civil Procedure that the surrogate's authority to supersede the guardian of an infant "must be exercised in the cases and in the manner prescribed by statute."

In view of these restrictive provisions it is manifest that one who is a lawful incumbent of the office of guardian, either by appointment of the surrogate or by virtue of a testamentary provision, can successfully resist in this court an application for his removal, until such facts and circumstances have been established as furnish statutory warrant for his suppression (*Matter of Kerrigan*, 2 Civil Pro., 334; *Ledwith* agt. *Union Trust Co.*, 2 Dem., 439).

The various causes which will justify the surrogate in removing a guardian appointed under title seven of the eighteenth chapter of the Code are fully set forth in the six subdivisions of section 2832. It is declared in the last of these subdivisions that a guardian of the person may be deprived of his office whenever "the infant's welfare will be promoted by the appointment of another guardian."

The legislature has seen fit to restrain the surrogate's authority as regards *testamentary guardians* within somewhat narrower limitations. He can only direct the removal of such a guardian upon the grounds assigned in section 2858; that is, "in cases where a testamentary trustee may be removed as prescribed in title 6 of this chapter." This is a reference to section 2817, whose second subdivision alone has any possible application to the case at bar. If, within the meaning of that subdivision, this respondent has been guilty of "misconduct in the execution of her trust," and has thereby become "unfit" to be continued in her office, she must be removed; otherwise the surrogate is powerless to displace her.

Now, there are no allegations in this petition that seem to

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me to require comment, except such as are in some way associated with the shameless behavior of the respondent's son, Richard Butler, towards the children, whom their mother had, by testamentary direction, intrusted to the respondent's care. I am so profoundly impressed with the truth of these revelations and with the desirability of placing these infants under new conditions, not only for preventing future mischiefs, but for effacing from their minds, if possible, the memory of indignities which they have already suffered, that if I had power under the circumstances here existing, to substitute another guardian in place of this respondent, I should not hesitate to exercise it.

But have I such power?

It is not suggested that the respondent connived at her son's disgraceful practices, and it is not claimed that she ever heard of them until about the time when they came to the knowledge of the petitioner. Nor does it appear that she knew or had reason to believe that evil consequences were likely to flow from the intimate relations that were allowed to exist between these children of a common household.

Her treatment of her son since the discoveries which gave rise to the present proceeding has furnished no just cause for criticism.

She is taken to task by petitioner's counsel for protesting her belief in the boy's innocence. But her credulity is perhaps not unnatural in a mother, and it does not seem to have betrayed her into any act or omission that can fairly be interpreted as "misconduct in the execution of her trust."

This petition must, therefore, be denied.

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SUPREME COURT.

LEWIS B. CRANE agt. THOMAS EVANS and another.

Attorney and client — Bond and mortgage — Authority of attorney to receive interest, or part of principal sum on bond and mortgage of client.

B. being the attorney and agent of the mortgagee, as such, so long as he had the bond and mortgage in his possession is authorized to receive the interest accruing thereon, and the mortgagor is safe in paying the same to him. But the possession of these papers alone gives him no authority to receive a part of the principal sum secured by the mortgage before it was due.

A mortgagor who pays interest or principal upon a mortgage to any one other than the mortgagee himself, when the person receiving the moneys has not in his possession the obligation, does so at his peril. In order to hold the principal to such payment he must be prepared to prove express authority.

Special Term, July, 1885.

THE above action was brought to foreclose a mortgage made by David W. Evans in 1879, to the plaintiff to secure the sum of \$5,000 payable January, 1884. The defense was payment. On the trial plaintiff produced the bond and mortgage mentioned in the complaint upon which he claimed interest from January, 1884. The defendants produced on the trial a satisfaction-piece of the mortgage, purporting to have been signed by the plaintiff in July, 1883, at which time the mortgage was marked "satisfied" in the register's office, but plaintiff had no knowledge of this "satisfaction" until July, 1884. Defendant also produced a paper purporting to be the bond of David W. Evans, bearing the same date and notarial certificate as appeared on the bond produced by the plaintiff, and in addition thereto, indorsements of payments of principal and interest, and receipt in full of the principal July, 1883. The acknowledgment in the bond produced by plaintiff contained the words "to me known and known to me" in written characters, while the same words in the acknowledg-

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ment of the bond produced by defendant were in printed characters. The bond produced by plaintiff had no indorsements of any payments. The trial lasted two days. Messrs. David N. Carvallo and Daniel T. Ames, experts in handwriting, were called by the plaintiff and testified that the bond produced by defendants was a forgery. The defendants called Dr. Charles M. Cresson, of Philadelphia, an expert in handwriting.

Further facts appear in the opinion.

Charles W. Dayton, for plaintiff.

Burrill, Zabriskie & Burrill, for defendants.

VAN VORST, J. — Baker was the attorney and agent of the plaintiff, the mortgagee, and as such, as long as he had the bond and mortgage in his possession, was authorized to receive the interest accruing thereon. Possessed of these instruments, under the facts of this case, the mortgagor was safe in paying the interest to him. But the possession of these papers alone gave him no authority to receive a part of the principal sum secured by this mortgage before it was due. To be so authorized he should have been specially and pointedly directed by the mortgagee to collect or receive it. The time fixed by the bond for the payment of the principal sum was the mortgagee's highest expression of his intentions as to the time for the payment of the principal. Of such limitations upon the power of the attorney to receive money upon the mortgage the mortgagor was bound to take notice. The receipt therefore by Baker from the mortgagee of the sum of \$1,000, in the month of February, 1882, towards the principal sum, not then due, was wholly unauthorized. This payment was concealed from the plaintiff, and he is not bound by it (*Smith agt. Kidd*, 68 N. Y., 130; *Williams agt. Walker*, 2 Sandf. Ch., 325.)

In October, 1882, the plaintiff withdrew from Baker the land and mortgage. That ended all semblance of power or

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authority on the part of Baker to receive anything on the mortgage. A mortgagor who pays interest or principal upon a mortgage to any one other than the mortgagee himself, when the person receiving the moneys has not in his possession the obligation, does so at his peril. In order to hold the principal to such payment he must be prepared to prove express authority. Baker, according to the evidence, retained in his own hands, after the delivery to the plaintiff of the original documents, a copy of the bond purporting to be executed by the mortgagor. Plaintiff was wholly ignorant of the existence of another bond in the hands of Baker. It is quite likely that, with a fraudulent purpose, Baker, shortly after the execution of the bond and mortgage in suit, caused to be prepared a duplicate bond, and it is upon this duplicate that all payments of interest as well as of principal are indorsed. His purpose undoubtedly was that, in the event that the bond and mortgage should be taken from him by the plaintiff, he might have in his hands the appearance of an instrument which should enable him to receive money from the mortgagor. In that he seems to have succeeded, for at different times afterwards he applied to the mortgagor for payment of parts of the principal sum, although not due, and he received the same, and in the end a forged satisfaction-piece of the mortgage was delivered to the mortgagor with the duplicate bond.

The evidence justifies the conclusion which I have reached that the so-called duplicate bond is also a forgery. Although purporting to bear date with the genuine bond it was not written on a similar blank. The printed form of the acknowledgment differs in material points from that found upon the genuine bond. The seals also differ. Crime is often detected by circumstances which the foresight of the perpetrator can neither discern nor guard against. The signature of the obligor is so well simulated that he might himself be deceived. The ink spots even on the real bond are imitated on the false instrument. But an inspection of the signature, and by a comparison of it with genuine signatures of the

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obligor, satisfies me that it is a forgery. This conclusion is supported by the testimony of experts. But the care and diligence of the attorney for the plaintiff has been rewarded by a discovery of evidence which puts the matter at rest. The acknowledgment upon this blank was not in the form printed for the stationers who sold it, until the year 1880, and after the time the bond and mortgage bear date. This is shown by the testimony of employes of the stationer and printer. The guilty party thus furnished the means of detecting his crime. The mortgagor is dead, and no light upon this subject can be had from him. But even were the bond in question a genuine instrument, then there were two bonds, for some unaccountable reason, executed and outstanding, when he paid the mortgage. And yet, when he received the satisfaction-piece, it was accompanied only by this instrument, the bond and mortgage remaining in the hands of the mortgagee.

From all the evidence, I am justified in deciding that the whole amount of principal is due and unpaid upon the bond and mortgage, and there must be judgment of foreclosure and sale.

SUPREME COURT.

EDWARD A. DURANT agt. JOHN O'BRIEN.

Referee — When report will not be set aside on the ground that referee was biased — Relations from which bias will not be inferred.

While courts should be careful to see that no improper relations exist between a referee and one of the parties to an action, and that nothing occurs during the progress of the trial which shall in anywise tend to produce a favorable impression in behalf of one of the parties to the reference, yet such scrutiny should not be carried to the extreme length of holding that because a referee sustains friendly relations to the kin of one of the parties, relations so close as to lead to his employment as his legal adviser, and the legal adviser of his estate, that such relations

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would bias his judgment in the action in which he had been appointed referee.

When the referee had heard the proofs, and made his report finding in favor of the plaintiff, and from the judgment perfected upon such report defendant had appealed to the general term, which general term had affirmed the judgment, and the defendant had appealed to the court of appeals, and while such appeal was still pending defendant made a motion to set aside the report of the referee upon the ground that such referee was biased in favor of the plaintiff:

Held, that the motion resting solely and only upon the ground that the referee was the friend and legal adviser of the nephew of the plaintiff, such fact of itself would not warrant the inference of bias and partiality, and especially when it appeared that this was known to the counsel of the party moving before the trial of the action was commenced.

Special Term, May, 1885.

MOTION by defendant to set aside the referee's report.

A. Lee Wager and Hamilton Harris, for defendant and motion.

Thompson & Andrews, for plaintiff and opposed.

WESTBROOK, J. — The plaintiff, Edward A. Durant, as the assignee of A. J. Williams & Co., brought this action against the defendant John O'Brien, to recover for an alleged balance due to them, as sub-contractors under the defendant, for work done and materials furnished upon the Clinton state prison and warden's house, at Dannemora, in this state. By order of this court the action was referred, on the 18th day of January, 1882, to Abraham V. De Witt, counselor-at-law, at Albany, N. Y. The referee was suggested by the counsel of the defendant, and consented to by the counsel for the plaintiff. After a number of hearings before the referee, the cause was finally submitted to him for a decision on the 1st day of July, 1882. The report of the referee was made on the 17th day of August, 1882, and was in favor of the plaintiff for the sum of \$5,251.97. From the judgment perfected upon such report, the defendant appealed to the general term

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of this court, and the appeal was argued in that court on the 5th day of December, 1882, and by its decision, rendered on the 3d day of February, 1883, the judgment entered upon the referee's report was affirmed, with costs. Within a few days thereafter an appeal was taken by the defendant to the court of appeals, which is still pending, unargued and undecided. The defendant now moves to set aside the report of the referee upon the ground that such referee was biased in favor of the plaintiff, and such bias is sought to be inferred from the relations which the referee sustained to one Allen B. Durant, a nephew of the plaintiff, as his attorney and counsel and friend.

There is no proof presented upon this motion tending to show that Mr. De Witt was in any way connected either as a friend or legal adviser with the plaintiff in the action; but it is insisted that because he was the friend and the legal adviser of the nephew of the plaintiff Allen B. Durant, and because he was employed in behalf of the estate of Allen B. Durant to conduct certain proceedings before the surrogate of the county of Albany, and because the plaintiff and Allen B. Durant were on friendly terms, that therefore the referee must have been biased in favor of the plaintiff. This inference, it seems to me, is most illogical and unjust. If adopted as sound it would prevent a judge from sitting in a cause in which any of the parties thereto were of kin to a friend and companion of such judge, and towards whom the judge had occupied the relation of legal adviser.

Prior to the appointment of Mr. De Witt as referee in this action, he had acted as the legal adviser of Allen B. Durant, the nephew, and when the parties and counsel in this action met before him for the first time for the hearing of this cause, the referee explained fully to the counsel his intimacy with Durant, and the relation which he bore to him, saying to them that he did so to enable the defendant's counsel, if they so desired, to have another referee appointed in his place. The counsel for the defendant refused to change the referee

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and insisted upon proceeding with the trial of the action before him. After this occurrence, and during the trial of the action before the referee, Allen B. Durant was taken ill, from which illness he never recovered. During such illness, and on the 20th of June, 1882, Mr. De Witt drew the last will and testament of Mr. Durant, and on the fifth of July following drew the codicil thereto. In November following A. B. Durant died, and in a contest in regard to such will before the surrogate, which was long after Mr. De Witt's connection with this cause as referee had ceased, Mr. De Witt acted as the counsel for the estate. There is, however, no evidence tending to show that Mr. De Witt ever consulted or advised with the plaintiff in regard to the nephew, his family or estate; on the contrary, the affidavit of Mr. De Witt and of the plaintiff both show that there was no intimacy whatever between them, and that they were merely passing acquaintances, and the only social intercourse between them consisted of formal calls by Mr. De Witt on new-years' days at the house of the plaintiff. While courts should be careful to see that no improper relations exist between a referee and one of the parties to an action, and that nothing occurs during the progress of the trial which shall in anywise tend to produce a favorable impression in behalf of one of the parties to the reference, yet such scrutiny should not be carried to the extreme length of holding that because a referee sustains friendly relations to the kin of one of the parties, relations so close as to lead to his employment as his legal adviser, and the legal adviser of his estate, that such relations would bias his judgment in the action in which he had been appointed referee. In the present case, as has already been said, the defendant and his counsel were fully informed, before the trial of the reference was commenced, that such relations existed between the referee and the nephew of the plaintiff. Whatever inference could justly and properly be drawn from such relation, could have been drawn as well when the trial of this cause commenced as it can be now. The defendant and his

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counsel then knew that Allen B. Durant, the nephew of the plaintiff was the friend and client of the referee. If that fact would of itself bias and disqualify the referee, it was then known and they had no reason to believe that because of the reference the relation which Mr. De Witt then sustained to Allen B. Durant would be broken off and his friendship suspended. All that has transpired since simply evidences the continuance of friendship and relations which existed when the trial of this action was begun, and from which no more unfavorable conclusion can now be drawn than could have been drawn at the commencement of the trial. The referee was well known to the counsel of the defendant, at least, if not to the defendant himself, when the relationship between the referee and the nephew were disclosed, and if such counsel, with minds keenly awake to the rights of their client, could see nothing in the relationship which Mr. De Witt sustained to Allen B. Durant to disqualify him from acting as such referee, it cannot be surprising if the judge to whom this motion is now submitted should be equally unable to see the disqualification which such relationship imposed. Many of the statements made by the widow of Allen B. Durant, as to the closeness of the friendship which existed between her deceased husband and the referee, are denied by the latter, and especially and flatly does he deny her general statement that he would uphold the Durants in all their difficulties with her. It is proper also to state that all the trusts and duties confided by the will of Allen B. Durant to the referee, have been renounced, and not accepted by him, and that therefore so much of the motion papers as allege the creation of such trusts by the will, can have no weight in the determination of this motion.

A careful reading of all the papers upon this motion has failed to present to my mind any fact which would justify an order setting aside the report and judgment in this action. There are loose assertions in the affidavits presented by the plaintiff to the effect that there was an intimacy between the plaintiff and the referee. Such allegations, however, are by

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persons who could not, and did not know the truth of the facts charged. If such intimacy was known to them, then such knowledge should have been used to vacate the order of reference before the report was made, or rather, it should have prevented the naming of the referee by the defendant, and the conclusion to proceed with the trial before him when his relation with Allen B. Durant was fully explained. It is evident, however, from all the allegations of the moving papers, that such general charges were founded upon subsequent inquiries and not upon actual knowledge. The positive and distinct denials of such intimacy by both the plaintiff and Mr. De Witt, and sustained by others who had the opportunity and means of knowing the truth of what they have affirmed, must be accepted as true, and therefore, all suspicions of bias founded upon such alleged intimacies must vanish, because deduced from supposed facts which have no existence in truth. The motion must, therefore, rest solely and only upon the ground that the referee was the friend and legal adviser of the nephew of the plaintiff. Such fact of itself would not warrant the inference of bias and partiality, and when it further appears that all this was known to the counsel of the party moving before the trial of this action commenced, it cannot be seen upon what possible ground this motion can be granted. If injustice was done by the report, the general term of this court did not discover it; but if it was in fact committed, the court of last resort in which this action is now pending, will do the defendant justice. It will be unjust to the plaintiff, upon the grounds presented, to subject him to the costs of another trial, and it would be a very grave reflection upon the character and standing of the referee for this court to assume that he was biased and prejudiced, simply and only because he had been the friend and legal adviser of a relative of the plaintiff.

The motion, therefore, to set aside the report must be denied.

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N. Y. COMMON PLEAS.

CAMPBELL PRINTING PRESS COMPANY agt. JOHN F. OLTROGGE.

*Conditional sales — Contract of, must be filed — Laws of 1884, chapter 315 —
Effect of not filing.*

Every contract in the nature of a conditional sale agreement must be filed according to the laws of 1884, chapter 315, or it is void as to subsequent purchasers and mortgagees in good faith.

The object of the statute is to render secret liens upon personal property ineffectual as to innocent purchasers, and the courts will not permit the statute to be evaded.

In determining whether the contract comes within the statute, the whole instrument is to be taken together and the ruling intention of the parties, to be gathered from the whole of it, is what is to be regarded.

General Term, June, 1885.

Livingston & Olcott, for appellant.

C. De Hart Brower, for respondent.

DALY, C. J. — I think we should hold that the agreement in this case is a mere device to evade what is required by the statute in the case of conditional sales (*Laws of N. Y., 1884, chap. 315*). This is a remedial statute, the object of which is to give some protection against loss or injury to persons buying personal property from those who have all the outward *indicia* of ownership by the possession and use of it, the sale of which may be defeated after the article has been paid for by a private agreement, by the terms of which the title to the property was to remain in the person originally contracting to sell it until the whole of the purchase-money was paid, which, in such conditional sales, is usually payable in installments at periods agreed upon.

The statute above referred to provides that unless such an agreement, or a copy of it, is filed in the manner provided for by the act, it shall be void as against subsequent purchasers or mortgagees in good faith, and the act further declares that

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such conditional sales shall become absolute, unless within thirty days of the expiration of each and every year thereafter a statement exhibiting the vendor's interest in the property is also filed. This is substantially requiring to be done in the case of conditional sales what has for a long time been required to be done in the case of mortgages of personal property, and in all such remedial statutes the rule is to consider what the mischief was that the law did not previously provide for—what remedy the statute meant to give to cure that mischief—and the act is to be so construed as to suppress the mischief and advance the remedy (*Co. Litt.*, 11, 42; *Potter's Dwarries*, 58).

The agreement under consideration declares that the plaintiffs, the Campbell Printing Press, &c., Co., let, and H. A. Landman hired for use, a printing press, which is particularly described by its name and numbers, for the term of ten months, at the rate of ten dollars a month, payable on the fifteenth of each and every month, beginning November 15, 1884; the lessee Landman to furnish suitable and proper foundations for the press at his place of business in Brooklyn; that he was to keep it insured during the said term in the sum of \$800, depositing the policy with the plaintiffs; that he was not, without the plaintiff's consent, to assign the lease, nor sublet the property, nor remove it during the term; that at the expiration of the term he was to deliver up the possession of it to the plaintiff; and that if default was made in the payment of any of the installments that the plaintiffs were to repossess themselves of the property and enjoy it thereafter as though this agreement had never been made.

The agreement further declares that the plaintiffs agreed to sell to Landman a printing press of the same number and description, warranted to do the same and equally good work, for the sum of \$700, to be paid in monthly installments of sixty dollars each, payable on the fifteenth day of each month thereafter for the term of ten months, being the same days that the ten payments of ten dollars each was to be paid. The

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agreement then declares that when the whole amount provided for, or the \$700 is paid, that the plaintiffs were to deliver to Landman the last named press, boxed on cars at their factory, for which, the agreement says, Landman is to pay the sum of \$100, and for the balance (\$700) he is to give his notes, payable, with legal interest, on the fifteenth of each month as before stated, and that upon the payment of all these notes the plaintiffs are to credit all rents paid for the press, and there is a final provision that this written contract contains the whole agreement; that the plaintiffs are to be governed solely by it, and not by any verbal agreement.

The whole amounts substantially to this: That contemporaneous with each monthly payment of ten dollars for what is declared to be a lease for ten months of the press delivered to and used by Landman, there is to be a payment by him of sixty dollars on each of the said days during the ten months towards the purchase-money of another press of exactly the same kind, which is to be delivered to Landman at the plaintiffs' factory when the entire \$800 is paid by him.

It is very plain to my mind that the whole design of this agreement is to evade the law requiring agreements for conditional sales to be filed, and the result in the case of this particular agreement has the very mischief which the statute was designed in some degree to guard against, for it is set up in the answer and admitted by the demurrer that the defendant, who was ignorant of the agreement between the plaintiffs and Landman, bought the printing press of Landman, paying him therefor the sum of \$700, the press being then in Landman's office and the defendant believing him to be the owner of it.

The statute applies to every contract for the conditional sale of chattels which shall be followed by an actual and continued change of possession of the thing contracted for, and the distinction resorted to in this agreement and relied upon to avoid the requirements of the statute was to provide that the press delivered should be held, under what is denominated

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a lease, whilst the payments are being made for the purchase of exactly the same kind of press, and which, when the purchase-money (\$800) was all paid, was to be delivered at the plaintiff's factory.

But it is obvious that the practical result of this kind of agreement would be in each instance that the press which is declared only to be leased is the one that in reality upon the payment of \$800 would be sold, for being then set up upon its foundations in the purchaser's place of business, it would be no object to him to have exactly the same kind of press delivered at the plaintiff's factory, as it would involve the removal of the one already set up and in use and the expense of transporting the other one from the factory of the plaintiff and setting it up on a "proper and suitable foundation," to use the language of the agreement.

The calling of what was provided for in that part of the agreement a lease does not necessarily make it so, especially in view of a statute, the object of which is to render secret liens upon personal property ineffectual as against innocent purchasers, unless the agreement creating the lien is filed in the manner provided for in the statute so that notice of it can be obtained upon inquiry, for the whole instrument is to be taken together, and the ruling intention of the parties, as gathered from the whole of it, is what is to be regarded (*Herzford* agt. *Davis*, 102 *U. S. R.*, 235; *Dibble* agt. *Hathaway*, 11 *Hun*, 574, 575.)

The agreement was one, in my opinion, that should have been filed under the statute, and I am therefore in favor of reversing the judgment.

In the Estate of John Baier, deceased.

SURROGATE'S COURT.

In the Estate of JOHN BAIER, deceased.

Code of Civil Procedure, sections 2690, 2814—When surrogate will not permit an executor or trustee to resign his trust.

The surrogate cannot justly permit an executor or trustee to resign his trust against the wishes of the legatees or *cestuis que trustent*, unless sufficient reasons are shown to exist for allowing such resignation.

New York county, August, 1885.

ROLLINS, S.—The petitioner's application to be relieved from continuing to act as executrix and trustee cannot, within the restrictions of sections 2690 and 2814 of the Code of Civil Procedure, be lawfully granted, unless the surrogate, in his discretion, shall find that "sufficient reasons" exist therefor. The only reason assigned in this petition is embodied in the general allegation that the petitioner is "too busy with her own private matters, and no longer desires to be busied" with her trust.

Her counsel supplements this claim for relief by pleading her limited knowledge of the English language and a lack of business capacity which amounts to an inability fitly to discharge her duties. He insists that by her retention in office the estate will be incumbered with a "needless appendage."

I find that she had sufficient knowledge of English and of business to claim and receive, under the decrees of October 13, 1881, and May 10, 1883, commissions amounting in all to \$1,491.76. Her petition expressly asserts that the duties that remain to be fulfilled are of a much simpler character than those which have been performed already; and, as her discharge is opposed by the *cestui que trust*, she must continue to play the modest role of needless appendage until she shows better cause than has yet appeared for being allowed to abandon it.

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SUPREME COURT.

THE PEOPLE *ex rel.* MARY E. WRIGHT agt. AMASA G. GENUNG
and SOLOMON L. HOWE, as school commissioners of the
county of Tompkins.

*Cornell University — Who entitled to free scholarship under Laws of 1872,
chapter 654.*

The person to be selected for a free scholarship in the Cornell University must be a student from one of the academies or public schools of the county from which he or she is to be selected.

The State Normal School, located at Cortland, is not one of the public schools of Tompkins county within the intent and meaning of the statute, and an attendance at such school does not entitle a person to such scholarship.

The candidates for such free scholarship should, each year, be selected from scholars in the academies and public schools during that year, and not from the best scholars who have at any time attended the public schools and academies of the county.

The position that a person is not a scholar of a high school because she was graduated at the close of its last term, and hence ineligible as a candidate, cannot be sustained. For the purposes of the act she must be regarded as a scholar of that school, at least until the end of the school year, and until that school shall again commence its sessions. The intention of the statute is that she may have all the advantages of that school so long as she is a member of it, and upon her final examination and graduation may then become a candidate for such scholarship.

Tompkins Special Term, August, 1885.

William N. Noble, for relator.

W. Hazlitt Smith, for Amasa G. Genung and Arthur Curtis.

James McLachlin, for Solomon L. Howe and Frank Knapp.

MARTIN, J. — This is an application by the relator for a *mandamus* to compel the respondents to issue to her the certi-

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ificate required by chapter 654 of the Laws of 1872, to entitle her to a free scholarship in Cornell University.

The statute creating such free scholarships and providing to whom they shall be awarded, so far as the same is applicable to the question involved on this application, is as follows: "The several departments of study in the said (Cornell) university shall be open to applicants for admission thereto at the lowest rates of expense consistent with its welfare and efficiency, and without distinction as to rank, class, previous occupation or locality. But, with a view to equalize its advantages to all parts of the state, the institution shall annually receive students, one from each assembly district in the state, to be selected as hereinafter provided, and shall give them instruction in any or in all the prescribed branches of study in any department of said institution free of any tuition fee or of any incidental charges to be paid to said university, unless such incidental charges shall have been made to compensate for damages needlessly or purposely done by the students to the property of the university. The said free instruction shall, moreover, be accorded to said students in consideration of their superior ability and as a reward for superior scholarship in the academies and public schools of this state. Said students shall be selected as the legislature may from time to time direct, and until otherwise ordered, as follows: The school commissioner or commissioners of each county, and the board of education of each city, or those performing the duties of such a board, shall select annually the best scholar from each academy and each public school of their respective counties or cities as candidates for the university scholarship. But in no case shall any person having already entered the said university be admitted as one of such candidates. The candidates thus selected in each county or city shall meet at such place and time in the year as the school commissioner or commissioners in the county and the said boards of education of the cities in those counties which contain cities shall appoint, and the school commissioner or commissioners and

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the said board of education, or such of them as shall attend and act, shall proceed to examine said candidates, and determine which of them are the best scholars, and they shall then select therefrom to the number of one for each assembly district in said county or city, and furnish the candidates thus selected with a certificate of such selection, which certificate shall entitle said student to admission to said university, subject to the examination and approval of the faculty of said university (*Chap. 654, Laws 1872*).

The respondents did not at any time during the past year select any candidate or candidates for such free scholarship from the academies and public schools of Tompkins county as required by this statute. They, however, gave notice that at a time and place designated by them they would examine such persons as should attend for that purpose, and thereby determine to whom the scholarship for the year 1885 should be awarded. In pursuance of that notice, and on the thirteenth and fourteenth of the present month, the respondents held such examination. Upon that examination four persons appeared as candidates and were examined. The persons thus examined were Frank Knapp, Arthur Curtis, the relator Mary E. Wright, and Mary Lawrence. Upon the completion of the examination the respondents determined that Frank Knapp was the best scholar, Arthur Curtis the second, the relator third, and Mary Lawrence fourth. Mr. Knapp is, and has always been, a resident of Tompkins county. He attended the public schools of that county until 1832, when he entered the State Normal School at Cortland, N. Y. He continued a scholar in that school until he was graduated in 1884, since which time he has been engaged in teaching. Mr. Curtis is also a resident of Tompkins county. He was graduated from one of the public schools of that county in the year 1883, and has not since been a scholar in any of the academies or public schools of the county or state. Both the relator and Miss Lawrence were residents of Tompkins county, and both attended the Ithaca High School, which is one of the public schools of that

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county, during the school year which commenced in the fall of 1884 and ended in the summer or fall of 1885. At the end of the last term of such school year they were graduated from that school. Since their graduation neither has been a scholar in any other school.

Subsequent to such examination and determination by the respondents, the relator duly demanded of the respondents that they should award her the Cornell scholarship for 1885, and issue to her a certificate of her selection, which they refused to do. That the candidates for this scholarship were not selected as required by law is conceded by all parties. Upon the argument, however, it was stipulated by the parties in interest that the application should be determined upon the sole ground of the eligibility as candidates of the persons examined. It is contended by the relator that neither Mr. Knapp nor Mr. Curtis was eligible as a candidate, and therefore although they were examined and passed a better examination than she, yet neither of them was entitled to such free scholarship. This contention is denied by the respondents and by Knapp and Curtis; and thus is presented the only question which it is necessary to determine upon this application. Was either Knapp or Curtis entitled to such free scholarship, although a better scholar than the relator? The determination of this question depends wholly upon the statute above quoted. It will be seen by an examination of that statute that one student from each assembly district in the county is to be selected each year by the commissioners for free instruction. The candidates for such free scholarship are to be selected from the scholars of the academies and public schools of the county. From these candidates only is the person to receive free instruction to be selected. From the reading of this statute it is quite apparent, I think, that the person selected for a free scholarship must be a student from one of the academies or public schools of the county to entitle him to the free instruction therein provided for.

It is unnecessary to determine whether such applicant must

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also be a resident of the county or assembly district, as that question does not arise in this case. But that each of the candidates must be a student from one of the academies or public schools of the county to be eligible as an applicant is, I think, quite clear. The claim that the State Normal School, located at Cortland, is one of the public schools of Tompkins county, within the intent and meaning of this statute, cannot, I think, be maintained. Hence, I am of the opinion that Knapp's attendance at the normal school at Cortland does not entitle him to this scholarship.

But Knapp and Curtis each contends that he had in former years been a student in the public schools of Tompkins county, and is therefore entitled to become a candidate for this scholarship. The relator, however, while she admits that they were in former years such students, insists that they were not at the time of such examination scholars from the academies and public schools of the county, and hence were ineligible. Thus the question is presented whether the person to receive such scholarship may be selected from the best scholars who have at any time attended the public schools and academies of the county, or whether he must be selected from those who are the best students in those schools during the school year including or immediately preceding the time of the examination and selection. The statute in effect provides that free instruction is to be accorded to said students in consideration of their superior ability and as a reward for superior scholarship in the academies and public schools of the state. One of the purposes of this provision, then, was to provide such free instruction as a reward for superior acquirements and as an incentive to the students in each of these schools to attain superior scholarship. The statute also provides that the commissioners shall select annually the best scholar from each academy and each public school as candidates for this scholarship.

These provisions indicate quite clearly, I think, that the intent of the statute is that the candidates for such scholar-

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ship shall be selected from those who are or have been scholars in these schools during the year in which the examination is had, or during the school year immediately preceding the time of the examination, when the examination is in vacation. The commissioners are each year required to select the best scholar from each school as such candidates. This must, I think, be held to intend that the selection shall be made from the scholars in attendance at such school during that year.

If the intent had been to include scholars who had attended these schools years before, some provision would have been made for notice to them so that all might have an opportunity to be examined as to their scholarship and to compete for such candidacy. No provision of that kind was made. Moreover it can hardly be said that a person who has been an attendant at a school, but whose relations with that school have been completely terminated years before, is a scholar of or from such school. He may have been educated at that school, but is not, I think, a scholar from it within the intent and meaning of this statute.

If the claim of the respondents were to be sustained it would follow not only that the scholars attending each of these schools would be brought into competition with all the scholars who had ever attended them, but it would also enable those who had once been applicants for such candidacy and failed to apply each succeeding year, and perhaps in the end succeed, to the exclusion of the best scholar attending that year.

If the construction contended for were to obtain it would practically subvert the purposes of the statute so far as this scholarship is intended as a reward to the scholars in these schools for superior scholarship, as under such a construction it might be indefinitely suspended, if not overthrown, and its purpose as an incentive to superior scholarship be easily defeated. I cannot think it will bear such a construction or that such was its intent.

Upon a careful reading of the statute I am of the opinion

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that the intent of this statute was that the candidates for such free scholarship should each year be selected from scholars in the academies and public schools during that year. If correct in this conclusion it follows that neither Knapp nor Curtis was eligible as such candidate and cannot, therefore, be properly selected.

The position that the relator is not a scholar of the Ithaca High School because she was graduated at the close of its last term, and hence is eligible as a candidate, cannot, I think, be sustained. For the purposes of this act she must, I think, be regarded as a scholar of that school, at least until the end of the second year, and until that school shall again commence its sessions. The intention of the statute was that she might have all the advantages of that school so long as she was a member of it, and upon her final examination and graduation might then become a candidate for such scholarship.

For the reasons before stated I conclude that neither Knapp nor Curtis was eligible as a candidate for this scholarship, but that both the relator and Miss Lawrence were, and as the relator passed the better examination, and was the best scholar of the two last named, she is entitled to be selected for the scholarship from that county for the year 1885, and to a certificate of such selection. It follows, therefore, that the relator's application should be granted and that of Curtis denied. But as no bad faith upon the part of the respondents is shown, without costs to either party.

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COURT OF APPEALS.

MARY E. STOUGHTON, plaintiff and respondent, agt. SAMUEL A. LEWIS, impleaded, &c, defendant and appellant.

Practice—Appeal—When motion to dismiss appeal to court of appeals may be made where case is on the calendar.

The court of appeals will entertain a motion to dismiss an appeal for which there is no foundation, without waiting until the case is reached in its regular order on the calendar.

A plaintiff is not precluded from making a motion to dismiss an appeal taken by a defendant because he (the plaintiff) has noticed the case for argument and placed it upon the calendar. He waives nothing by so doing. It is still optional with him to wait until the case is reached on the calendar, or to make his motion to dismiss on the ground that the appeal is unauthorized.

Where, in an action to foreclose a mortgage, a complaint containing all the requisite allegations has been served upon defendant, who afterwards obtained a stipulation from plaintiff's attorney for further time to answer, agreeing not to put in any answer and not to ask any further extension of time. On the last day defendant served a demurrer which was, on motion, overruled and stricken out, and plaintiff proceeded as if no demurrer or answer had been interposed and obtained his judgment by default. The defendant appealed to the general term, where it was affirmed, and from the affirmance defendant appeals to this court: *Held*, that, the demurrer having been overruled, the judgment went by default in the same manner as if no demurrer had been served, and no appeal is allowed from a judgment entered by default. The order overruling the demurrer not having been appealed from cannot be assailed on an appeal merely from the judgment.

Decided February, 1885.

MOTION to dismiss an appeal.

The facts are sufficiently stated in the opinion.

Augustus Haviland, for plaintiff and respondent. 1. The service of the demurrer was a clear violation of the stipulation and, therefore, properly stricken out (*People* agt. *Stephens*, 52 N. Y., 306; *Townsend* agt. *The Masterson, &c., Co.*, 15 N. Y., 588; *Cox* agt. *N. Y. Cent., &c., R. R. Co.*, 63

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N. Y., 414). 2. The demurrer was clearly frivolous and interposed in bad faith to delay the prosecution of this action, and judgment was properly granted thereon (*Code of Civil Pro.*, sec. 537; *Kay agt. Whittaker*, 44 *N. Y.*, 565; *Osgood agt. Whittlesey*, 10 *Abb.* 134). 3. No appeal is allowed from a judgment entered by default. The demurrer having been overruled, the judgment went by default against the defendant in the same manner as if no demurrer had been served (*Innis agt. Purcell*, 58 *N. Y.*, 388; *Briggs agt. Bergen*, 23 *N. Y.*, 162). 4. The appeal should be dismissed, with costs, and as the defense and appeals were entirely without merit and interposed for delay, to the great damage of the respondent, she should be allowed extra damages in this court under *Code of Civil Procedure* (sec. 3251, sub 5).

Franklin Bein, for plaintiff, appellant.

EARL, J. — This was an action to foreclose a mortgage and a complaint containing all the requisite allegations, for such an action was served upon the defendant Lewis. Thereafter he obtained a stipulation from plaintiff's attorney for further time to answer, agreeing at the same time that he would not put in any answer and would not ask or apply to the court for any further extension of time. On the last day given by the stipulation the attorney for Lewis served a demurrer to the complaint, alleging as the ground of demurrer that the complaint did not state facts sufficient to constitute a cause of action, and thereafter the attorney for the plaintiff made a motion at special term to overrule and strike out the demurrer on the ground that it was frivolous and served in violation of the stipulation, and an order was made by the court overruling it and setting it aside, on the ground that the defendant Lewis was precluded by the stipulation from demurring or answering. After that the plaintiff proceeded as if no demurrer or answer had been interposed and obtained his judgment of foreclosure by default. The defendant Lewis then appealed from that judgment to the general term, where

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it was affirmed, and from the affirmance there he has appealed to this court. He did not appeal from the order striking out and setting aside the demurrer. That order, therefore, remains in force and cannot be assailed on an appeal merely from the judgment. The appeal from the judgment, therefore, brings nothing for review to this court. It was a judgment by default. There was no trial and no exceptions. The plaintiff is not precluded from making this motion, because he noticed the case for argument and placed it upon the calendar. He waived nothing by so doing. It was still optional with him to wait until the case was reached on the calendar, or to make this motion on the ground that an appeal from such a judgment to this court was not authorized.

The motion should, therefore, be granted, with costs.

All concur.

CITY COURT OF NEW YORK.

JACOB F. WYCKOFF agt. JOHN B. DEVLIN.

Security for costs — Non-resident having place of business in city not required to give — Code of Civil Procedure, sections 8268, 8160.

In an action in the city court of New York, a plaintiff residing without the state, but having an office in the city of New York, where he regularly transacts business in person, cannot be required to give security for costs.

Sections 8268 and 8160 Code of Civil Procedure construed.

Special Term, September, 1885.

MOTION to set aside order requiring plaintiff to file security for costs as a non-resident.

W. J. McCready, for motion.

J. M. Fiske, opposed.

HALL, J. — It is conceded for the purposes of this motion that the plaintiff does not reside in the state of New York,

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but has an office or place in the city of New York where he regularly transacts business in person, and plaintiff claims that under the provisions of section 3268, Code of Civil Procedure, as modified and limited by section 3160, he cannot be required to give security for costs in an action in this court. Section 3268 provides that the defendant in an action brought in a court of record may require security for costs to be given * * * where the plaintiff was, when the action was commenced, either: "1. A person residing without the state, or if the action is brought in the marine (now city) court of New York * * * residing without the city or county * * * wherein the court is located."

The clear meaning of this provision would seem to be that in actions in courts of record not specially designated, security can be required only when the plaintiff is a non-resident of the state, but in the courts designated by name (including this court), security may be required where the plaintiff is a non-resident of the city or county over which such courts have jurisdiction, without regard to non-residence in the state, and except for the limitation contained in section 3160, no question could arise as to defendant's right in this action to require plaintiff to give security.

Section 3160 provides, among other things, that "a plaintiff, who has an office for the regular transaction of business in person within the city of New York is deemed a resident of that city within the meaning of section 3268 of this act."

The language of this section is peculiar; the words "a plaintiff" mean any plaintiff, without regard to his place of residence. There is no restriction in this regard, and the intention of the legislature seems to have been to treat persons carrying on business in New York city, without regard to their place of residence, precisely the same as residents, so far as allowing them to commence and prosecute actions in this court. And such a construction is no innovation upon the practice in this court as it existed for several years before the Code of Civil Procedure.

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Prior to 1876 the practice was entirely regulated by the Revised Statutes (*tit. 2, part 3, chap. 10*), which, in general terms, required security to be filed, upon demand, by any plaintiff residing outside of the jurisdiction of the court in which the action was commenced.

But chapter 136 of the Laws of 1876 (specially applicable to this court), section 51, provides "where a suit shall be commenced in the court — 1, for a plaintiff not residing within the city and county of New York * * * the defendant may require the plaintiff to file security for the payment of the costs," &c. But subdivision 13 of that section provides: "The provisions of this section shall not apply to plaintiffs who have a place of business or of stated employment within the city of New York, who, for the purposes of this section, shall be deemed residents." And this exemption was without regard to whether or not the plaintiff was a resident of the state; that is provided for by subdivision 14 of the same section.

It will thus be seen beyond a doubt that at least from 1876 down to the time the Code took effect a plaintiff having a regular place of business in New York, who sued in this court, was not obliged to give security, although a non-resident plaintiff suing in any other court of record was obliged to give such security. This act of 1876 and also the provisions of the Revised Statutes were repealed by the general repealing act (*Bliss' Code* [vol. 2], 1058 and 1059), but it seems to me a perfectly reasonable conclusion that the legislative intention was substantially to re-enact the provisions of the act of 1876 in regard to actions in this court, and to extend and continue the immunity of that act to all persons doing business regularly in this city.

If, as contended by defendant's counsel, the exemption provided by section 3160 was intended to apply only to residents of this state, they have been singularly unfortunate in the use of language; but I do not think that such was the intention, as a reference to section 3169 applicable to attachments in

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this court (*sub.* 3) will show there was no difficulty in finding language to express the idea contended for by defendant. That subdivision provides "that the defendant, being a resident of the state, is not a resident of the city of New York, and has not an office within that city where he regularly transacts business in person," but no such restriction as to residence in the state is found in section 3160. The case of *Stephenson* agt. *Hanson* (4 *Civil Pro. Rep.*, 104) has no application; in that case plaintiff was a resident of Brooklyn.

I am therefore clearly of opinion that a non-resident of the state of New York, who has an office in the city of New York where he regularly transacts business in person, cannot be required to give security for costs in an action in this court.

The motion to set aside the order requiring plaintiff to file security must be granted, with ten dollars costs to plaintiff to abide the event.

SUPREME COURT.

JAMES MCCREDIE, agt. THE CITY OF BUFFALO, JONATHAN SCOVILLE, mayor of the city of Buffalo, WILLIAM P. BURNS, clerk of the city of Buffalo, JOSEPH G. BARNARD, comptroller of the city of Buffalo, and JAMES H. CARMICHAEL, treasurer of said city of Buffalo.

Municipal corporations — Municipal duties — Power to indemnify officers.

A municipal corporation, in addition to the powers specifically granted by its charter, has full power to act in reference to all matters in which it has an interest, except so far as restrained by constitutional limitations. Accordingly, where an action *quo warranto* is brought by the people to test the title of a municipal officer, and the complaint is dismissed on the merits:

Held, that the expenses necessarily incurred by defendant in establishing his right to the office, are expenses necessarily incurred in the discharge of his duty, and that the city has full right and power to pay the same.

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Also, *held*, that it is entirely immaterial what attorneys performed the services, assuming they were proper and necessary.

Special Term, August, 1885.

ACTION to enjoin the defendantz from issuing a warrant to collect \$500 for the benefit of Day & Romer.

Leroy Andrus, for plaintiff.

Day & Romer, for defendants.

CORLETT, J. — On the 7th day of May, 1883, the mayor appointed Michael Newell a police commissioner of the city of Buffalo for the term of six years, he at once qualified and entered upon the discharge of the duties of his office. In July, 1884, the people, through the attorney general, brought an action in the supreme court for the purpose of ousting him from office upon the sole ground that he was an alien not a citizen of the United States, and therefore disqualified from holding the position or discharging the duties of police commissioner, the complaint was framed upon that theory and assumption.

Newell, the defendant, through Day & Romer, his attorneys, defended the action and in his answer controverted the charge of his alienage. It also alleged that he was a citizen qualified to hold the office, discharge its duties, and that he was lawfully so engaged. The action was tried at the Erie circuit and resulted in a dismissal of the complaint on the merits, with costs against the plaintiff. The trial court decided that Newell was a citizen eligible to hold the office; that he was properly engaged in the discharge of its duties, and that he was entitled to its emoluments. Judgment was entered accordingly, after which the plaintiff appealed to the general term, which appeal is still pending. After judgment and the appeal the common council of the city employed Day & Romer to defend the appeal. A bill was also presented in their behalf for legal services performed by them in defend-

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ing the action against Newell, the amount being \$500 above the taxable cost. This bill was allowed by the common council and a warrant directed to be issued for its payment out of the police funds. It would have been approved by the mayor and all the city officials, except for the bringing of this action and enjoining the defendants.

The contention on the part of the plaintiff is to the effect that the city of Buffalo has no power under its charter or as a municipal corporation to pay for those legal services; also, that if Newell was entitled to aid from the city it could only be granted for services rendered by the city attorney, and that he was not employed by Newell or rendered any legal service in defending the action.

The defendants' position is that Newell was an officer and agent of the city of Buffalo; that it was his duty to act in the capacity and discharge the duties of police commissioner in behalf of the city; that if he had failed to defend the action brought to oust him he would have been removed although entitled to hold the office; that a neglect to defend would have been a breach of duty to the city and a violation of the obligations he had assumed when he accepted the office; that having good title to the office he would violate his trust in neglecting to defend it, and that upon his title being judicially established it was not only within the power of the city, but its duty, to fully indemnify him for the expenses necessarily incurred in protecting the rights of the city to his services as police commissioner; that it was entirely immaterial what attorneys performed the services assuming they were proper and necessary. It is agreed that the sum of \$500 was a proper and reasonable charge. The city appears by its attorney in this action, and in its answer alleges, in substance, that Day & Romer's bill should be paid. It appears by the pleadings and evidence that the common council and all the officials representing the city favor its payment, which would have been made except for this action.

It is a general rule that municipal corporations have full

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power to act in reference to all matters in which they have an interest except so far as restrained by constitutional limitations (*Le Couteux* agt. *City of Buffalo*, 33 *N. Y.*, 333; *City of Buffalo* agt. *Bettinger*, 76 *N. Y.*, 393; *Albany City National Bank* agt. *City of Albany*, 92 *N. Y.*, 363; *The Board of Supervisors Orleans Co.* agt. *Bowen*, 4 *Lans.*, 24; *Meech* agt. *City of Buffalo*, 39 *N. Y.*, 198; *Davies, Mayor, &c.*, agt. *City of New York*, 83 *N. Y.*, 297.) Newell was an officer and agent of the city of Buffalo (*The People* agt. *Vilas*, 36 *N. Y.*, 459). Important duties were imposed upon him by the office he had accepted, which it was his duty to discharge. So far as appears, he was entirely competent and willing to perform them; that he desired to do so. A failure to defend the *quo warranto* action would have resulted in his removal. The people in this case challenged his title; the duty therefore devolved upon him to prove affirmatively his right to hold and discharge the duties of the office. The rule would be otherwise if the action had been brought in behalf of another claimant (*People ex rel. Judson* agt. *Thacher*, 55 *N. Y.*, 525).

Section 37 of the charter provides for raising money for the expense of the police board, also for necessary legal expenses "and all expenses which may necessarily be incurred by reason of any civil or criminal action or proceeding against the police commissioners or either of them, or against any member of the police force for acts done in the discharge of his or their duty." It was the duty of Newell to act as police commissioner. It was because he so acted that the action was brought. If upon the trial of the action against Newell it had appeared that his acts as police commissioner were unauthorized because he was not a citizen, then it is very clear that he would not be discharging his duty in assuming to exercise the functions of the office.

Section 37 prescribes the duties of the city attorney with reference to actions brought against the police commissioners. There are no negative words in the charter limiting the power of the city to the expenses affirmatively provided for; nor

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does the charter prevent the city from employing any lawyers it chooses in litigations affecting it or its rights.

It is a general rule that in the absence of words of limitation or restriction, rights or remedies which existed before the passage of a statute are not taken away (*Truman* agt. *Richardson*, 68 *N. Y.*, 617; *People* agt. *Hall*, 80 *N. Y.*, 117; *Candee* agt. *Hayward*, 37 *N. Y.*, 653.)

It is an established rule that a municipal corporation may indemnify its officers and agents for expenses necessarily incurred in the *bona fide* discharge of their duties (*Roper* agt. *Town of Launburg*, 90 *N. C.*, 427; 30 *Abb. L. C.*, 303; 1 *Dill. Mun. Corp.*, sec. 98; *Haddsell* agt. *Inhabitants of Hancock*, 3 *Gray*, 527; *Babbitt et al.* agt. *Selectmen of Savoy*, 3 *Cush.*, 530; *Bancroft* agt. *The Inhabitants of Lynfield*, 18 *Pick.*, 566; *Cooley's Const. Limitation* [5th ed.], 258).

The expenses incurred by Newell in preventing his unlawful removal from the city office which he held were necessary; they were also incurred in the discharge of his duty. Section 5, chapter 359 of the Session Laws of 1883, provide for the filling of vacancies in the board of police, and also provides that they may be removed from the office by the superior court of Buffalo for neglect of duty, malfeasance in office, bribery or corruption; but no removal shall be made unless upon charges, or unless the party shall have been served with a copy of the charges and have an opportunity to be heard and present evidence in his own behalf. The statute carefully protects the rights of the city to his services, also his own rights by providing he shall not be removed except for cause. The legislature proceeds upon the assumption that the person sought to be removed is *an officer*; the action against Newell to remove him on the other hand was brought and carried on, on the assumption that he was *not an officer and never had been*.

While it is true the action was not brought against him for any particular official act, it is equally true that its scope was much more comprehensive and sweeping. The essence of the

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complaint was that he had no right to perform any official act; that he had intruded himself upon the people and was assuming to act as an official when in fact he was not an officer and had no right to act in that capacity. In short, every act was charged to be illegal and in violation of the rights of the people. The issue joined presented the single question as to Newell's right to act in an official capacity. His defense rested exclusively upon his title to the office which, of course, included his right to act in the performance of his duties. It is perfectly clear, therefore, that the reasons for indemnifying him in case he had title were quite as cogent as though he was sued for some official act, and no reason is perceived why the corporation has not full power to indemnify in such a case.

It may well be, when the people challenged his title to the office, the city might say: "This challenge assumes that you are not an officer, therefore the city is not bound to defend your right to hold it against the people's contention; it devolves upon you to prove affirmatively your title. If you succeed the city can then act as the occasion requires."

Newell, therefore, employed his own lawyers and established his title. The city, through its officers then said, in substance: The attack upon your title was without foundation and you shall be fully indemnified for the expenses necessarily incurred in establishing your right to the office.

It was, undoubtedly, the intention of the legislature to indemnify the officers and agents of the city for expenses incurred in the discharge of their duties. It is a familiar rule that statutes will be so construed as to attain the ends of justice (*Engel agt. Fisher*, 15 *Abb. N. C.*, 72; *People ex rel. Steiner agt. Morrison*, 78 *N. Y.*, 84).

But if the language of the charter is not sufficiently broad to include this case, still the authorities above cited clearly show that the city has power to pay this bill. Its right to indemnify its agents and officers in the discharge of their duties includes this case. When the judgment established his title the city ratified his acts in the employment of counsel

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and assumed the expense. A subsequent ratification is equivalent to an original authority. *Heerman* agt. *Clarkson* (84 *N. Y.*, 171); *Hodges* agt. *Buffalo* (2 *Denio*, 110); *Gamble* agt. *Village of Watkins* (7 *Hun.*, 448), have no application. The first case is where an appropriation was made to an hotel keeper to pay the expenses of entertaining certain citizens; the other was where an appropriation was made to entertain a company of editors. The plaintiff's argument in the last case was to the effect, that by liberal supply of provisions and incidents the editors would be induced to indulge in editorial puffs in favor of the village, which would amply repay it for its expenditures. The justices and county court took that view, but the supreme court took the liberty of saying "that is not a duty for which the municipality was created." It is obvious that if the supreme court could have been made to see that the village of Watkins was created for the purpose of feasting editors, it would have reached the same conclusion as the courts below. The question of double costs throws no light upon this case.

In *The People on the Relation of Morris* agt. *Adams* (9 *Wend.*, 464) the court held that a defendant in an action in the nature of a *quo warranto* is not entitled to double costs, for the reason that it was "in the nature of a writ of right for the people against him who claims or usurps an office, franchise or liberty, to inquire by what authority he supports his claim in order to determine the right," and was not, therefore, within the statute allowing double costs. The character of an action is determined by the complaint (*Walsh* agt. *Darrah*, 52 *N. Y.*, 590). The action against Newall was not brought "for or concerning any act done by him *by virtue of his office*, or for or concerning the omission of any act which it was his *official duty to perform*." On the other hand the action was brought to restrain and prevent him from doing any official act. The statute awarding double costs, therefore, has no application.

The conclusion reached is that the city had authority to pay

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the bill; that if the power was not expressly conferred by the charter it was inherent in the city as a municipal corporation within the limits and scope of its corporate powers.

The complaint must be dismissed on the merits, with costs.

SUPREME COURT.

THOMAS MOORE agt. HENRY A. TAYLOR and another.

SAME agt. SAME.

Supplementary proceedings — When orders for, will be vacated — Code of Civil Procedure, section 66 — Attorney's lien — Mode of enforcing it.

Where orders were granted for the examination of a judgment debtor on proceedings supplementary to execution, upon affidavits in the usual form made by one of the attorneys who recovered the judgments for the plaintiff. On motion by the judgment debtor to vacate such orders upon the ground that prior to the granting of the orders the title to the judgments had passed to a receiver :

Held, that the judgment debtor had the right to make such motion.

Held, further, that an attorney must obtain leave of the court before he can institute supplementary proceedings upon a judgment in favor of his own client after the title to that judgment has passed from the client to the receiver, and especially where the proceedings are instituted by an affidavit that says nothing about the lien of the attorney.

Monroe Special Term, August, 1885.

MOTIONS to vacate orders for the examination of Henry A. Taylor on proceedings supplementary to execution.

W. H. Olmsted and T. Bacon, for Taylor.

J. Van Voorhis, for plaintiff.

ANGLE, J. — These orders were granted upon affidavits in the usual form made by one of the attorneys who recovered the judgments for the plaintiff, and the motion is made upon the ground that prior to the granting of the orders the title

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to the judgments had passed to a duly appointed receiver of the plaintiff.

The point is made in opposition to the motion, that Taylor has no right to make it; but I think he has such right and must be heard. If he should pay plaintiff these judgments such payments would not be good as against the receiver, and it follows that he has a right to question all attempts to collect the judgment from him by the plaintiff

It is also claimed in opposition to the motions, that the plaintiffs attorneys who recovered the judgments have a right to go on with these proceedings in their own interests as lienors upon the judgments against Taylor, under section 66 of the Code, and *Pickard agt. Yancer* (21 Hun, 403); *Wilbur agt. Baker* (24 Hun, 24); *Frostman agt. Schanling* (21 Weekly Dig., 358); and *Merchant agt. Sessions* (5 Civ. Pro. R., 24), are cited.

The last above case is in the New York city court at special term, and the court held that the lien of the attorney may be enforced by supplementary proceedings, and is not affected by the fact that the client had made a general assignment. But in that case the affidavit on which the order was obtained stated (what is not contained in the affidavits in the present cases) that the attorney who recovered the judgment, and who made the affidavits upon which the order was obtained, had "a lien thereon for his costs and fees, of which lien he had given the defendant notice." Other cases on the attorney's lien and rights are collected in *Turno agt. Parks* (2 How. [N. S.], 35). The case of *Stoddard agt. Trenbath* (24 Hun, 182), is to some extent inconsistent with the foregoing cases.

Dimmick agt. Cooley (gen. term, 4th dept. ; 4 Civ. Pro. R., 141), holds, that before an attorney can proceed with an action after settlement and discontinuance by his client, he must obtain leave of the court. The court say (p. 149): "It would be an unwise and dangerous practice, extremely hazardous to the rights of both parties to allow an attorney to continue the action for the purpose of collecting his costs, without first

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obtaining consent of the court that he may proceed for that purpose. When such permission is given, it is the duty of the court to direct as to the time and manner, and watch the proceedings so as to fully protect the rights of both parties, and not unnecessarily annoy and embarrass either."

A fortiori, it seems to me, he must obtain leave of the court before he can institute supplementary proceedings upon a judgment in favor of his own client after the title to that judgment has passed from the client to a receiver, and where the proceedings are instituted by an affidavit that says nothing about the lien of the attorney.

I do not deem it requisite here to discuss other suggestions made by the counsel for the plaintiff. I have considered them all, and my conclusion is, that the motions must be granted, with ten dollars costs as of one motion.

SUPREME COURT.

MARY JANE WARD, as executrix, &c., agt. DE WITT CLINTON WARD, as executor, &c., and others.

Will—Construction of—Trust—What necessary to vest in executors a trust estate—When trust will be implied—When no illegal suspension of the power of alienation—Gift of income—Effect of.

No express gift to executors is necessary in order to vest them with a trust estate. A trust will be implied when, upon a consideration of the whole will, that clearly appears to have been testator's intention, or when the duties imposed are active and render the legal title in the executors convenient and reasonably necessary, although not essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain, the dispositions of the will.

Testator gave the use and income of all his estate to his widow, and after her death to his two sons, share and share alike, remainder to their heirs, and clothed his executors with such powers and duties as clearly showed that he contemplated their retaining possession of the estate, and the beneficiaries receiving the income from them:

Held. the estate vested in the executors in trust for the life of the widow, and after her death for the lives of the two sons respectively.

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Also, *held*, there is no illegal suspension of the power of alienation.

A gift of income "subject to the necessary expenses" of living and the education of two sons:

Held, to create a charge upon the income in the recipient's hands which she was bound to satisfy.

A desire that "such sums from time to time as may be necessary and deemed advisable to be paid to" persons named "that they * * * may not want for the necessities of life:"

Held, to create charges upon the income of the estate which the widow is bound to satisfy, and which the court will enforce in the event of her failure to do so in good faith.

Further, *held*, the court will not pronounce in advance the legal consequences of an event which has not happened and may never occur.

Special Term, October, 1885.

TESTATOR gives to his wife for life and widowhood "the use and income" of all his estate, "subject to the necessary expenses of living, * * * for my two sons, * * * until they arrive at the age of twenty-one years, if it should be necessary, and the necessary expenses of good schooling and a collegiate education, if either or both should desire it," giving them each on reaching thirty years \$10,000, to pay which the executors are authorized to dispose of any part of the estate.

The will further provides: "And, further, I desire that such sums from time to time as may be necessary and deemed advisable, be paid to" three persons named, "that they, or either of them, may not want for the necessities of life; and upon my wife's decease the use and income of all my estate, subject to the above provisions, to my two sons, share and and share alike," remainder to their "heirs." In the event of his wife's remarriage he gives her, "in lieu of all dower," \$10,000, to be paid to her by the executors, who for this purpose, and also for purposes of reinvestment, are authorized to dispose of all or any part of his property.

He appoints his wife, the plaintiff, and the defendant De Witt Clinton Ward, his executors, and by a codicil to the will appoints them his "trustees" for the purpose of carrying out any of its provisions.

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B. S. Clark, for plaintiff.

De Witt, Lockman & De Witt, for defendant De Witt O. Ward, executor, &c.

Thomas Allison, for defendant Brindley.

Percy D. Adams, for defendants A. P. Ward *et al.*

James M. Hunt, for defendant D. W. C. Ward (2d).

Harris & Corwin, for defendant W. E. Ward.

VAN VORST, *J.* — This is an action for the construction of the will of Mortimer Ward, deceased. The testator died leaving a large estate; it was, however, principally personal.

The question which has been chiefly litigated is whether the will creates a trust in the executor and executrix over the residuary estate, and if so the extent of the trust. There is no express gift in words of the estate to the executors in trust; nor is it necessary for the creation of a trust in them that there should have been. It would be enough to work such result if, upon a consideration of the whole will, in the light of the duties to be performed by the executors, it should clearly appear that it was the intention of the testator to vest the title to the property in them, or that it was necessary for the proper discharge of those duties.

Where a trustee is necessary to effectuate the valid purposes of a will, and there is language in the instrument sufficient to justify it, a trust will be implied and the court will enforce it. Dominion over an estate, acts to be done and duties to be performed, created and imposed by a testator, may be of such a nature as by a necessary implication to create a trust in the executors for the purposes of the will, to continue until the acts are done and the duties are performed.

The testator, by the first clause of his will, gave to his wife "the use and income of all his real and personal estate during her natural life, should she not marry again, subject to" certain charges. From this it is urged by her learned counsel

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that the widow takes a legal estate in the realty, and is entitled to the actual possession and control of the personal property for life.

This would be so undoubtedly, unless a consideration of the whole will showed a contrary intention in the testator. An absolute, unqualified devise of the rents and profits of land for life is but a devise of the lands for the same period.

In *Craig v. Craig* (3 Barb. Ch., 76, 94) the testator gave to his daughter Mrs. Hudson for life the income and assets of a fixed part of his estate. It was held that she did not succeed to the legal title, but that the same was in the executors in trust. In that case, however, the will directed that the "income and assets" were to be paid to her by the executors.

In the case under consideration there is no such express direction, and the question arises, what was the testator's intention and does the will by implication show that the widow was to receive the income from the executors?

Would the legal title in the widow to the real and personal estate for life conflict with other parts of the will, or present an obstacle to the proper performance of duties in respect to the property with which the executors are expressly charged, such duties involving the control, management and disposition of the estate?

The testator afterwards in his will declares: "And if my wife should marry again, I give and bequeath to her, in lieu of all dower, ten thousand dollars in money, to be paid to her by my executors hereinafter named, and they are authorized to dispose of any of my property to pay the amount." This plainly enough indicates that the executors were themselves to hold the property with a right to dispose of it, or sufficient thereof to meet a contingency which might happen in the future, the remarriage of his wife.

Again, the testator directs that upon his two sons arriving at the age of twenty-five years, each should receive, in real or personal estate, equal to \$10,000, or, instead, an equivalent in money of \$10,000, and his executors were authorized to dis-

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pose of any of his property to pay such legacies; and, further, that if his executors should deem it necessary and advisable, for the better security and interest of his estate, to change the investment of his property, they were authorized to dispose of all or any part of it and invest the proceeds in United States government, New York state, or New York city bonds registered, or on good bond and mortgage on New York city or Brooklyn city improved property, in sums of not more than \$10,000 each, upon property at a moderate value worth at least double the amount. The power here conferred is large, and the discretion as to the conversion of the estate is coextensive with the estate itself and is to be exercised by the executors for its better investment and security. It is true that the realty might be sold by the executors for the purposes of distribution under a mere power unaccompanied by the legal title. But the real estate is inconsiderable in comparison with the personal. But what the executors are called upon to do is more than the exercise of a simple power. The proceeds are to be invested by the executors in registered bonds and in bonds and mortgages. These securities, for convenience and for convertibility, should be taken in their names. Investments once made, if the security should require it or bonds be paid off, would require further reinvestment. It is quite clear from the whole will that the duty in this regard would devolve upon the executors, and that they are to hold the estate for the remaindermen.

The testator's intention is made sufficiently clear by the codicil to his will, in which he expressly declares that the executors named therein are his "trustees for the purpose of carrying out any of its provisions." Being therefore entitled to the possession of the personal estate, upon the duties and trusts above mentioned, and to hold it for the purposes of the will, and having the power to sell and convert the realty into personal property for investment, the executors, holding the property, must necessarily collect the income, and from them the beneficiaries must receive it.

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The relation and duties of executors under a will are regulated by statute and well settled rules of law. Such duties can be discharged, the affairs of the estate can be settled, distribution of the assets made, and the executors discharged, within a reasonable short space of time. But under this will duties are enjoined and responsibilities are created involving the exercise of discretion, care and judgment with regard to investment of the whole estate, and the holding of the same for indefinite periods of time, out of which spring liabilities to which executors, as such, are not exposed. These are incidents of estates held in trust, and are duties and liabilities which trustees assume. The testator was a business man, and he deemed it proper that these responsibilities should not fall upon his wife alone, and hence he joined his brother with her as executor and trustee that the management of the estate might have the benefit of his experience and services.

There are many cases in the books which discuss the subject of the creation of trusts under wills. Trusts will not be declared by the courts unless the language of the will determines such to be the testator's intention. But the result above reached upon the facts of this case, and each litigation of this nature rests upon its own peculiar facts I believe to be in harmony with the current of authority and with the general rules running through the cases (*Savage* agt. *Burnham*, 17 *N. Y.*, 561; *Tobias* agt. *Ketchum*, 32 *N. Y.*, 319; *Law* agt. *Harmony*, 72 *N. Y.*, 408; *Vernon* agt. *Vernon*, 53 *N. Y.*, 351).

In *Robert* agt. *Corning* (89 *N. Y.*, 225) a rule is deduced and formulated in these words in the opinion of ANDREWS, C. J.: "A trust will be implied in executors when the duties imposed are active and render the possession of the legal estate in the executors convenient and reasonably necessary, although it may not be essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain the dispositions of the will."

This rule covers the case under consideration. It is evident

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that the trust in the executors continues during the lifetime of the widow, in the event that she should not remarry. Her remarriage even would not defeat the trust. It is needless, however, to discuss the effect of the remarriage of the widow upon her own interests under the will. It would be gratuitous to pronounce in advance the legal consequences of an event which has not happened and may never occur. But the trust does not end with the life of the widow, but will continue during the lives of the testator's two sons, and the remainder will be held and preserved by the trustees, and the survivor of them, for those to whom it is in the end and after her death given. The trust works no illegal suspension for a period beyond two lives. As to the income, it is in substance, after the death of the widow, to be separated into two shares, each son taking a half part thereof (*Monarque* agt. *Monarque*, 80 N. Y., 320; *Wells et al.* agt. *Wells et al.*, 88 N. Y., 323).

By the terms of the will the widow takes the household furniture absolutely, and all the income of the estate for life should she not marry again. This income, collected by the trustees, must be paid over to her, but she takes this income subject to the charges which have been by the testator impressed upon it in her hands, and these charges should be paid and satisfied by her thereout.

The provisions for the support and education of the testator's two sons, during the time and under the conditions and limitations imposed by him, must be met by the widow out of the income of the estate received by her.

The provisions made in favor of the testator's aged mother, sister and aunt, in themselves considerate, are also charges upon this income in her hands, and the duty and obligation is cast upon the widow to make such necessary provisions for these persons as the testator clearly intended. In this she will doubtless be aided by her cotrustee.

It is not for the court at this time to assume that this will not in good faith be done, nor to indicate the sums, as is now asked, to be paid to the beneficiaries. The amount rests much

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in the discretion and judgment of the widow in the light of their needs.

These provisions are not simply recommendations. They embody the testator's kind intentions and will towards those who had a natural claim upon his bounty. To such claims he yielded in making these provisions, and in the event of any failure to carry them out in good faith they may be enforced by the judgments of this court (*Johnson agt. Cornwall*, 26 *Hun*, 499; *Tolley agt. Greene*, 2 *Sandf. Ch.*, 9; *Lawrence agt. Cooke*, 32 *How.*, 126).

The above covers the substance of the various questions raised upon the trial.

SUPREME COURT.

ALFRED C. W. CARTER, respondent, agt. GEORGE .
TALLCOTT, appellant.

Attorney and client — Responsibility of attorney — The degree of skill and diligence required to be observed by an attorney and counselor to entitle him to enforce payment for his services.

Persons employed as attorneys and counselors to perform services for others must be reasonably well informed of the legal principles applicable to and governing the disposition of the business committed to their charge; and when they fail to inform themselves of statutory provisions or well settled principles of law readily accessible by means of ordinary care and attention, and in consequence thereof the business committed to them is mismanaged, and the persons employing them are deprived of their legal rights, they will not only forfeit all legal claim for compensation, but in addition be justly held responsible for any loss or injury sustained by means of such misconduct by the person or persons for whom they may be employed.

An attorney who is employed to defend two actions arising out of the same contract, and sets up the same counter-claim, consisting of an indivisible demand as a defense in both actions, and upon the trial of the first action withdraws the counter-claim, except so much thereof as is necessary to extinguish plaintiff's demand, and thereby deprives defendant of the benefits of the remainder of the counter-claim upon

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the trial of the second action, is not entitled to compensation for the services so rendered.

An attorney who appeals from an order referring an action involving a long account with a view of taking the appeal to the supreme court of the United States, on the ground that the order violated the provisions of the Constitution of the United States requiring jury trials, is not entitled to compensation for the services rendered on such appeal and is liable to indemnify his client against the expenses to which he was subjected in prosecuting it.

First Department, General Term, May, 1885.

Before DAVIS, P. J., and DANIELS, J.

THE facts are sufficiently set forth in the opinion.

R. H. Underhill, for appellant.

William R. Garrard, for respondent.

DANIELS, J. — The judgment was recovered for the amount found to be due to the plaintiff and Nelson Cross, who was his partner, and had assigned his interests in this demand to the plaintiff, for services performed by them as attorneys and counselors in the courts of this state for the defendant. The defense relied upon was that the services had been unskillfully performed by the plaintiff and his assignor, and that they were accordingly of no value to him, but involved him in loss which he would not otherwise have sustained. The services principally drawn in question were performed in two suits brought by Charles E. Moore against the defendant, upon a contract upon which he had employed Moore to act as his agent in securing the sale of a medical compound made by him. In the first suit Moore claimed to recover for commissions earned by him under the contract during the month of September, 1874, and in the second suit the claim was for damages for breach of contract arising out of his discharge by the defendant before the expiration of the period mentioned in the agreement. The defendant by way of defense alleged the non-performance of the contract by Moore through which

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he had sustained damages in his business to a large amount, which he presented as a counter-claim against the causes of action alleged by Moore against him. The answers were substantially the same in each case, and the action for the commissions, which was by far the least important of the two, was first brought to trial, and this counter-claim was presented as an answer to that action, but before it was submitted to the referee the defendant's counsel withdrew from his consideration all that part of the counter-claim which should exceed the demand of the plaintiff in the action. The referee in that action afterwards found and reported in favor of Moore, the plaintiff, and judgment was entered upon his report.

The second action afterwards came on for trial at the circuit, but before its trial leave was obtained to set forth by way of reply the judgment entered in the first action on the referee's report as a bar to the residue of the counter-claim relied upon in the answer in the second suit. And under that reply it was held by the court that the defendant's counter-claim was barred by what had taken place upon the trial of the first action, and that this portion of his defense was accordingly out of the case. It appears by the evidence, and the fact was also found by the referee that the defendant and his counsel regarded the counter-claim as a meritorious demand which might be sustained by evidence within the defendant's control on the trial of the action. And upon these facts the question accordingly arises whether their conduct was that of competent and skillful counsel in following the course they adopted concerning the counter-claim on the trial before the referee. This counter-claim was considered and regarded by them as a proper subject for trial before a jury, and they were apparently under the impression that they could make use of so much of it as would answer the claim made by Moore in his first action, and afterwards rely upon the residue not only as a defense to the second action, but as the basis of a recovery for the balance against Moore, the plaintiff. This was manifestly and clearly an erroneous view to be taken of the rights of the defendant

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in the enforcement of the counter-claim, and which according to the evidence of the assignor Cross was not anticipated. The law at that time, as well as at the present time, would not permit an entire demand to be divided in this manner. The defendant and his counsel had their election whether they would make use of the counter-claim in the first or second action, but they could not use it in both. This counter-claim arose out of the contract upon which Moore based his right to recover in each of these actions, and by section 150 of the Code of Procedure which was at that time in force, it formed a legal answer to either of the actions brought by Moore the plaintiff. And in either, under the authority of section 274 of the Code of Procedure, the defendant, upon supporting the counter-claim by proof, was entitled to relief by way of judgment in his favor after extinguishing by means of it the demand presented as the basis of the plaintiff's right of action. And that was the regular as well as the legal course to be followed, if the counter-claim was used at all upon the trial of the first action before the referee. Neither the Code nor the settled principles of law not dependent upon it permitted the course to be taken, which was adopted at the close of the evidence on the trial before the referee (2 *Pars. on Cont.* [6th ed.], 619, and cases in note; *O'Dougherty v. Remington Paper Co.*, 81 *N. Y.*, 496, 499, 500). The law upon this subject was clear and unmistakable, and the facts subjecting this controversy to its application have not only been proved by the evidence, but they have been specifically found by the referee himself. And yet it was determined by him that the defendant's counsel in thus withdrawing from the consideration of the referee a part of the counter-claim, exhibited such skill and exercised such diligence as is usual with lawyers of average learning and ability at the New York bar.

The evidence of the legal gentlemen who were examined upon the trial of the action, so far as it was permitted to be given, did not support this view of the conduct of the counsel. With certain qualifications, those who were examined on

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behalf of the plaintiff did not disapprove of their conduct, but upon the facts themselves as they were sustained and found; that the counter-claim was deemed to be a meritorious one; that the proper forum for its trial was that of a court and jury, and that the right so to try it was lost by what took place concerning it before the referee, they did not approve of the practice followed by defendant's counsel. Neither can that be approved of by the well settled principles of the law which require that professional gentlemen engaging as attorneys and counselors in the service of others shall be reasonably well informed of the legal principles applicable to and governing the disposition of the business committed to their charge. They are not to be held responsible for errors of judgment which may arise after that degree of care and attention has been devoted to their professional employment, as is ordinarily devoted by persons reasonably competent, experienced and well qualified for the discharge of professional duties of this description. But if they fail to inform themselves of statutory provisions or well settled principles of law, readily accessible by means of ordinary care, attention and investigation, and in consequence of that failure the business committed to them is mismanaged, and the person or persons employing them are in that manner deprived of their legal rights, there they will not only forfeit all legal claim for compensation, but in addition to that be justly held responsible for any loss or injury sustained by means of such misconduct by the person or persons for whom they may be employed. This subject was considered in *Von Wallhoffen* agt. *Newcombe* (10 Hun, 236), and in the course of the opinion of presiding justice DAVIS it was held that, "the law requires that every attorney and counselor shall possess and use adequate skill and learning, and that he shall employ them in every way according to the importance and intricacy of the case. And if a cause miscarries in consequence of culpable neglect or gross ignorance of an attorney he can recover no compensation for any services which he has rendered but which were useless

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to his client by reason of his neglect or ignorance" (*Id.*, 240), and the authorities referred to fully maintain this just and sensible legal principle.

Under the law, as it has been settled and the facts found by the referee himself as they were established by the evidence in the case, the plaintiff was not entitled to recover for so much of the services of himself and his associate as had been performed in this manner, and by which the defendant was deprived of the right to try this counter-claim before a jury and secure to himself the probable advantages of such a trial. The course which they elected to follow resulted in an adjudication against the defendant upon the counter-claim; which was a conclusive bar to the residue of it when it was brought up for consideration upon the second trial. And that could have been ascertained by them to be the law of the case by any reasonable or well directed effort that might have been made to discover it. They failed to acquire that knowledge, and accordingly failed to discharge the duties which the law imposed upon them under their employment to the defendant. And so far as they have been allowed to recover compensation in this action for such services, the judgment is erroneous and cannot be sustained.

A reference of the first action was resisted by the defendant's counsel, and they appear to have entertained the conviction that the order referring the case was made in violation of the Constitution of this State and of the Constitution of the United States. Upon both these subjects they were under a palpable misapprehension of the law. For the Constitution of this State, as it was adopted in 1846, maintained the right to a trial by jury in that class of cases only in which it had been previously used. But previous to its adoption it was the common and well established practice of the courts to refer trial of actions which should involve the examination of long accounts, although either of the parties might oppose the order directing the reference. And the present Constitution of the State was adopted with that under-

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standing of the law and designed to perpetuate it by restricting the right to trial by jury to cases in which it had previously been used. The Constitution of the United States, so far as it related to the right of trial by jury, was restricted to proceedings in the courts of the United States, and had no reference to actions arising under and prosecuted in the courts of a State. These were quite familiar principles, and yet the counsel for the defendant when the order of reference was made, advised an appeal from it with a view of finally taking it to the supreme court of the United States, on the ground that it violated the clause of the Constitution of the United States providing for jury trials. And under that advice an appeal from the order was taken to the general term, where this, as well as other views were impressed upon the consideration of the court. That appeal was determined adversely to the defendant, and no further proceeding was taken upon it. The legal views under which the appeal was taken in this manner were not sanctioned by the witnesses who were sworn and examined before the referee, so far as their evidence was taken. But the referee, in his conclusions, considered that the defendant's counsel exercised such skill and diligence as is usual with lawyers of average learning and ability at the New York Bar in advising and prosecuting the appeal on this ground. But this was altogether too indulgent a view to be adopted of the skill and diligence required to be observed by a professional legal gentlemen engaged in managing and caring for the legal interests of other parties. There was no plausible authority justifying or supporting the course that was taken upon this subject, and for the services of the counsel in that appeal they had no legal claim against the defendant, but should have been held liable to indemnify him against the expenses to which he was subjected in prosecuting that appeal.

Upon both these subjects professional evidence proposed to be given by the defendant was excluded upon the trial. The questions which were asked were not objected to as being in

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any respect improperly framed or propounded to the several witnesses, but they were objected to in the most general terms, and on such objections the answers were excluded. These questions were designed to elicit, in a more particular manner than had otherwise been shown, what the views of the witnesses to which they were put were concerning the conduct of the defendant's counsel. And they should have been permitted to be answered, for counsel in framing hypothetical questions have been held to be "not confined to facts admitted or absolutely proved, but facts may be assumed which there is any evidence on either side tending to establish, and which are pertinent to the theories which they are attempting to uphold" (*Dilleber v. Home Ins. Co.*, 87 N. Y., 79, 83). And within that rule these questions should have been permitted to be answered.

In another action which had been prosecuted by the defendant as plaintiff, an injunction had been set aside and proceedings were taken to ascertain the damages caused by the injunction to the defendant. And upon the reference ordered for that purpose several days were consumed by the defendant's counsel in endeavoring to make proof of the fact that the defendant in that action had been guilty of a contempt by the violation of the injunction while it remained in force. In this manner expense had been incurred by the defendant, and he was also charged by the plaintiff for the value of the services performed by his counsel.

A series of questions were propounded in different forms to the witness Freling H. Smith, designed to elicit testimony indicating this conduct to exhibit the absence of ordinary professional skill and acquirements. The questions were put in proper form, under the authority just referred to, for the production of that character of evidence, but they were all upon the most general objections overruled, and the answers were excluded. If some of these questions might be criticised as to their form, but which were not objected to on that ground, others were clearly free from objection, and the answers

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proposed to be taken from the witness should have been received.

To the rulings made by the referee, excluding the evidence offered, exceptions were taken on behalf of the defendant. So they were as to his conclusions concerning the professional conduct of the defendant's counsel in the management of the counter-claim, and in the appeal from the order of reference, and these exceptions seem to be very well founded. In the disposition of the objections as well as in the views adopted concerning the effect of the evidence, the learned referee was involved in error, and as those errors were substantially injurious to the defendant, the judgment in the case should be reversed and a new trial ordered, with costs to the defendant to abide the event.

DAVIS, P. J., concurred.

SUPREME COURT.

WILLIAM STARK agt. CLARK A. STARK and another.

Code of Civil Procedure, section 740 — Acceptance of offer of judgment — May be amended by supplying affidavit of attorney that he was authorized to make it.

Upon a motion by an attaching creditor to set aside a judgment and execution, which judgment had been entered upon plaintiff's acceptance of an offer made by defendants, because the acceptance did not have annexed thereto any affidavit to the effect that the plaintiff's attorneys were duly authorized to accept said offer, as required by section 740 of the Code of Civil Procedure:

Held, that the court has power to allow an amendment *nunc pro tunc*, annexing the proper affidavit; and where it appears that the omissions to annex the proper affidavit to the acceptance was an inadvertence of the attorney, and that the authority to accept actually existed, the amendment should be granted.

Monroe Special Term, July, 1885.

MOTION by George N. Crouse and another, as attaching creditors of defendants, to set aside the judgment and execu-

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tion herein, because the acceptance of defendants' offer of judgment had not annexed thereto the affidavit of plaintiff's attorney, that he was duly authorized to make it on behalf of the plaintiffs. Also motion by plaintiff for leave to amend *nunc pro tunc* by now annexing such affidavit.

Judgment was entered in this action July 15, 1885, for \$542.16, upon plaintiff's acceptance of an offer of judgment made by defendants. Execution has been issued thereon and a levy made thereunder by the sheriff of Wayne county. The offer of acceptance did not have annexed thereto any affidavit to the effect that the plaintiff's attorneys were duly authorized to accept said offer, as required by section 740 of the Code of Civil Procedure.

The moving creditors have since commenced an action in this court, in which a warrant of attachment has been issued to the same sheriff against defendants' property.

T. Hogan, for creditors.

J. W. Dunwell, for plaintiff.

ANGLE, J. — An objection is made to the motion of the creditors, that they are strangers to the judgment and cannot be heard to question it for want of an affidavit showing authority to accept the offer of judgment. Their counsel claims such right under *Bates* agt. *Plonsky* (28 *Hun*, 112), in which it was held that where personal property has been levied on under an attachment, the attaching creditor may maintain an action to have a prior assignment executed by the debtor, and an execution issued upon a judgment confessed by him, declared fraudulent and void, and to have the priority of the lien acquired by him under the attachment established. There are at least two features that distinguish the matter under consideration from that case: 1st. In that case the attachment had been levied; in the present case the papers show only that the attachment had been issued to the sheriff who

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had already a levy on the property under plaintiff's execution. If a sheriff makes a levy upon goods on one execution and afterwards a second execution comes to his hands the levy is sufficient for both (*Ryder agt. Gilbert*, 16 *Hun*, 165), and cases cited. But I am not aware that it has ever been held that a levy on goods on an execution is sufficient levy under an attachment which afterwards comes to the hands of the same sheriff. The Code (*sec.* 649), prescribes how a levy under a warrant of attachment must be made. It does not appear to have been complied with here. It seems quite clear to me that the creditors cannot, without a levy under their attachment, maintain their motion. 2d. There is an obvious distinction between an action by an attaching creditor to set aside a prior confessed judgment because intended to hinder, delay or defraud creditors, and a motion by such creditors, to set aside the judgment for want of conformity in the practice to a provision of the Code. The consideration of this distinction involves the plaintiff's motion to amend. "Defects and irregularities not affecting the jurisdiction of the court and where no fraud or collusion is imputed to the parties, the remedy for such defects is given to the party alone (*Gere agt. Gundlach*, 57 *Barb.*, 15; *Rouf agt. Meyer*, 2 *How.* [*N. S.*], 20), and thus we come to the question whether this defect is jurisdictional. In *McFarren agt. St. John* (14 *Hun*, 387), where defendant moved to set aside an adjustment of plaintiff's costs, and that defendant be allowed costs, the defendant had made an offer of judgment, but had not annexed to it the affidavit required by section 740. The plaintiff's attorney paid no attention to the offer, and the court sustained him, saying, in substance, that the offer was a nullity, because not verified; that retaining the offer did not waive the defect; that plaintiff could not enter judgment upon the offer; and the concluding part of the opinion is: "The provision of section 740 of the Code of Civil Procedure, requiring that when an offer or acceptance is subscribed by an attorney he shall annex to it his affidavit, to the effect that he is authorized to make it on

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behalf of the party, is new, and was obviously regarded by the legislature as material to the rights of both parties. So far as the party in whose behalf it is made is concerned, the opposite party can waive nothing for him. In short, unless the offer when subscribed by the attorney is verified according to the statute, it cannot have the effect to set the party in motion on whom it is served. He is not required to notice it in any manner. He need not return it, and he waived nothing by retaining it. The defect is not a mere irregularity, but is a matter of substance." I have made these quotations to show that the court was only considering a question as between the parties to the judgment, which was all that was before them. The case of *Riggs* agt. *Weydell* (17 *Hun*, 515), differed from *McFarren* agt. *St. John*, in the fact that the plaintiff declined to accept the offer but gave no reason therefor. Upon the trial the plaintiff recovered less than the offer and then defendant moved to be allowed to amend the offer by annexing an affidavit. In denying the motion at special term the court said: "If the defendant desired the benefit of the statute they were bound to do just what the statute pointed out. To talk of amending is to misconceive the office of amendment; besides, that would be to make now for the first time a good offer," and this opinion was approved at general term. This case was affirmed (78 *N. Y.*, 586), the court saying: "We concur with the special and general term, that the offer to allow judgment to be taken was imperfect because not in conformity with the Code, and that there was no waiver of the defect by the notice served by the plaintiff's attorney upon the defendant's attorney, or in any other manner. We are also of the opinion that if the case was one in which courts were authorized to allow the defendant to serve the affidavit *nunc pro tunc*, it was matter of discretion with the special term and having been once refused there, as well as by the general term, no appeal lies to this court." It will be observed that the court of appeals are more guarded than the general terms in 14 *Hun* and 17 *Hun* (*supra*), that

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court characterizing the offer as "imperfect." The next case cited for the creditors is *Werbolowsky agt. Greenwich Insurance Company* (5 Civ. Pro. R. 303), where the city court of New York deny the power of the court to allow an amendment by supplying an affidavit to an offer, and the above cases in 14 *Hun* and 17 *Hun*, are cited as denying the power. I do not read those cases as denying the power. In *Eagan agt. Moore* (2 Civ. Pro. R., 300), the New York common pleas held at special term that the court had such power. In all these cases the question arose between the parties to the judgment, and they are all the cases arising under section 740 that have come within my examination.

The provision of the Code with regard to offers and their acceptance are no more statutory or matters of substance than the verification of the complaint for certain purposes, and yet after judgment a plaintiff was allowed to amend *nunc pro tunc* by filing an affidavit of verification (*Jones agt. U. S. State Co.*, 16 *How.*, 129); nor than an affidavit of default, and yet, an irregularity in assessing damages without such affidavit is a question of practice and not reviewable in the court of appeals (*Catlin agt. Billings*, 16 *N. Y.*, 622); nor than the provisions relating to the confession of judgments. Indeed the court in *McFarren agt. St. John*, say: "In short, the same reasons exist in respect to an offer as in case of a confession of judgment, for holding that all the substantial requirements of the statute have been complied with." The case of *Mitchel agt. Van Buren* (27 *N. Y.*, 300), is then in point and should receive more than a passing notice. It was a motion by a subsequent judgment creditor to set aside a prior confession of judgment, and on that motion the court permitted an amendment to support the judgment by signing and verifying a new statement stating the facts more specifically. The reasoning of DENIO, C. J., after showing that the court had the same power of amendment over confessed judgments as over any of their records, proceeds to state the provisions of section 173 of the Code of

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Procedure (*Code of Civ. Pro.*, sec. 723) and says: "This is very broad language, and plainly embraces a case like the present where it was shown that the proceeding was in good faith and the intention of the parties was to create valid judgments for debts actually due to the amount stated in the judgment." "It is a jurisdiction of the same kind with that which it (the supreme court) exercises in relieving against defaults and slips in practice." This case was followed in *Cook agt. Whipple* (55 N. Y., 166).

In *Fawcett agt. Vary* (59 N. Y., 597), where the affidavit that no answer or demurrer had been served and which had been filed with the clerk for the purpose of perfecting judgment by default, had been properly sworn to before the proper officer who had neglected to sign the jurat, and the omission had not been discovered until after the judgment, the court held it had power and it was within its discretion to permit the officer to sign *nunc pro tunc*.

In *Lawton agt. Kiel* (51 Barb., 30), a warrant of attachment had been issued upon an affidavit sworn to before a commissioner in another state, but no certificate of the secretary of state had been obtained as required by the statute, and the court at general term held that an objection for that cause was not fatal—that the omission might be amended and supplied. The special term in *Williamson agt. Williamson* (64 How., 450) held that such an omission of the certificate of the secretary of state to an affidavit verifying a complaint upon which an order for the publication of summons was granted, the court never acquired any jurisdiction, but it does not appear in that case that there was any application to supply the defect (*See, also, to same effect, Phelps agt. Phelps*, 6 Civ. Pro. R., 117, at special term).

Without further examination, I conclude by holding that *Michel agt. Van Buren* is sufficient authority for the power of amendment invoked by the plaintiff, and that, as it appears that the omission to annex the proper affidavit to the acceptance was an inadvertence of the attorney, and that the

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authority to accept actually existed, therefore the amendment asked by the plaintiff should be granted.

Motion of creditors denied and motion of plaintiff granted, without costs to either party.

N. Y. SUPERIOR COURT.

WILLIAM W. JOHNSON and another, executors, &c., agt.
JOHN P. DUNCAN.

Title to real estate — Specific performance — when performance may or may not be resisted — Laches.

A purchaser cannot justify his refusal to perform his contract by a mere factious objection to the title tendered him, nor is it sufficient for him when the jurisdiction of an equity court is invoked to compel him to perform his contract merely to raise a doubt as to the vendor's title.

Before he can successfully resist performance of his contract on the ground of defect of title, there must be at least a reasonable doubt as to the vendor's title, such as affects its value, and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable.

Inexcusable laches and delays will debar a party from the relief which they being absent, he might have by the judgment for specific performance.

Time, though not ordinarily of the essence of the contract may become so, if by its effluxion a change of value or other material change of circumstances has been produced, but if the delay of the defendants is unreasonable and inexcusable, it is enough to relieve the unwilling party from the contract.

It seems, that a party to a contract for the purchase of land has no equitable lien for the amount paid on the execution of the contract where he has lost the right to enforce such contract by his own laches.

Special Term, October, 1885.

ACTION for specific performance.

Carlisle Norwood, Jr., for plaintiffs.

John E. Parsons, for defendant.

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INGRAHAM, J.—The rule as settled in this state is: "The purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title tendered him, nor is it sufficient for him when the jurisdiction of an equity court is invoked to compel him to perform his contract merely to raise a doubt as to the vendor's title. Before he can successfully resist performance of his contract on the ground of defect of title there must at least be a reasonable doubt as to the vendor's title, such as affects its value and would interfere with its sale to a reasonable purchaser and thus render the land unmarketable" (*Hellnigel agt. Manning*, 97 N. Y., 60; *Schrivver agt. Schriver*, 86 N. Y., 575). And after a careful examination of this case I cannot see that the existence of the contract made by the plaintiffs' testator to Mr. Grant raises a reasonable doubt as to the title. The laches of Mr. Grant or his assignor, Mr. Chaffee, would debar them from enforcing the specific performance of their contract.

In the *Merchants' Bank agt. Thompson* (55 N. Y., 12), it is said: "That inexcusable laches and delays will debar a party from the relief which they being absent he might have by the judgment for specific performance. Time, though not ordinarily of the essence of the contract, may become so, if by its effluxion a change of value or other material change of circumstances has been produced. * * * The other rule must be, that if the delay of defendants is unreasonable and inexcusable, it is enough to relieve the unwilling party from the contract."

It is claimed, however, by the defendant that as against a subsequent purchaser with notice a vendee under a prior contract who has paid part of the purchase-money has a lien on the land, and a second purchaser holds the property subject to such equitable rights, and to support that claim *Chase agt. Peck* (21 N. Y., 581), and *Clark agt. Jacobs* (56 *Howard's Practice*, 519), are cited. In *Chase agt. Peck* the court held that a grantor of land had an equitable lien upon the land for the consideration of the grant, and such a lien becomes in

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effect an equitable mortgage upon the land. I can find no authority in that case for the proposition that a party to a contract for the purchase of land would have an equitable lien for the amount paid on the execution of the contract where he had lost the right to enforce such contract by his own laches.

In *Clark agt. Jacobs (supra)*, judge VAN VORST says "that sufficient has been decided to recognize and declare that a lien exists in favor of the vendee when the purchase money or a part of it has been prematurely paid before the conveyance," but an examination of the cases cited by him to sustain that proposition shows that such a lien has only been sustained where the failure to comply with the contract was the fault of the vendor and not of the purchaser, or where the contract was tainted with fraud on the part of the vendor, and no case has been cited where it was held that where the purchaser had an opportunity to comply with the contract, and had refused, that a lien existed in his favor for the amount paid. In this case it is not disputed that at the time of the tender of the deed to Mr. Grant plaintiffs had no knowledge of the assignment of the contract to Mr. Chaffee. The record of the assignment was not constructive notice to them (*Washburn agt. Burnham*, 63 N. Y., 135).

Under all the circumstances of this case I am of the opinion that if any lien existed in favor of Mr. Grant against the property for the \$10,000 paid by him on account of the purchase-money it was destroyed by his laches and by the tender to him of the deed for the conveyance of the property. I think, therefore, that plaintiff's title to the property is good, and that plaintiff is entitled to judgment for a specific performance of the contract. Under the circumstances, however, I am of the opinion that there should be no costs awarded the plaintiffs.

Judgment is ordered accordingly

Findings and judgment to be settled on notice.

Matter of the Thirty-fourth Street Railroad Company.

SUPREME COURT.

In the Matter of the Application of the THIRTY-FOURTH STREET RAILROAD COMPANY, for the appointment of three commissioners to determine whether its railroad ought to be constructed, &c.

Street railroads — Commissioners — When application for appointment of, should be denied.

Where, upon an application to the general term for the appointment of commissioners to determine whether a proposed railroad should be constructed through certain streets in New York city, it appears that such railroad cannot legally be built by reason of the refusal of other railroad companies already lawfully occupying the streets with their tracks to consent to its construction, such application should be denied (DAVIS, P. J., *dissenting*).

First Department, General Term, May, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

Grosvenor P. Lowery and Abram Wakeman, for applicant.

Horace Russel, C. A. Hand and Austin G. Fox, opposed.

MOTION on behalf of the railroad company for the appointment of commissioners, &c.

DANIELS, J.— The petitioner is a railroad corporation created and organized under the authority of chapter 252 of the Laws of 1884 to construct and operate a street surface railroad in Thirty-fourth street, in the city of New York. Its road is designed to be a double track surface railroad, extending over routes as they have been described in the application. From connections with the Hudson river, at the foot of West Thirty-fourth street, through, along and upon West Thirty-fourth street and East Thirty-fourth street, to connections with the ferry at the foot of East Thirty-fourth street, East river; from connections with this company's route in West Thirty-fourth

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street, at Tenth avenue, through, along and upon Tenth avenue, to West Forty-second street; thence through, along and upon West Forty-second street, to connections with the ferries at the foot of that street at the Hudson or North river; together with all switches, sidings, turnouts and turn-tables and suitable stands as may be necessary for the convenient working of such road.

Notice of the application has been given, as it was provided it should be, by section 5 of this act. This notice has been required to be given to each abutting property owner who may be found not giving his consent to the construction and operation of the railroad, and the only object to be promoted by giving such notice was to secure these owners an opportunity to appear and oppose the application made for the appointment and selection of commissioners. The act has not in terms declared that object, but it results from the fact that notice of the application has been directed to be given to the persons withholding their consent, and that could have been designed for no other purpose than to permit them to contest the application for the appointment and selection of commissioners. On behalf of the owners of abutting property on that part of Thirty-fourth street extending from Sixth, easterly to Lexington avenue, the right of the company to the appointment of commissioners has been contested and denied. This portion of Thirty-fourth street, with the exception of church edifices fronting upon parts of it, has been devoted to the erection and maintenance of private residences, many of them of a very costly character, and their owners to a great extent very decidedly object to the construction and operation of the railroad over this portion of the street. In support of their opposition various facts have been relied upon to render it effectual, which may be more appropriately considered hereafter.

The extreme length of the petitioner's proposed railroad is 12,357 feet, over the much greater part of which other surface railroads have already been built and are now maintained and

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operated. One of these railroads is that of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company. That includes the space between the Hudson river and Tenth avenue for a distance of 1,800 feet. The Forty-second Street and Grand Street Ferry Railroad Company also has its two tracks upon this portion of Forty-second street, and then proceeds by the way of Tenth avenue to Thirty-fourth street, a distance of 2,100 feet, and thence upon Thirty-fourth street to Sixth avenue for a further distance of 3,600 feet. And the New York and Harlem Railroad Company owns, maintains and operates a double track surface railroad in Thirty-fourth street, extending easterly from Lexington avenue to the East river, a distance of 2,304½ feet. These several railroad companies have refused their consent to the construction of the petitioner's railroad, and upon that fact the resistance has been mainly placed to the success of the petitioner's application.

By section 14 of chapter 252 of the Laws of 1884, under which the petitioner has been incorporated, it has been provided and declared that, "except for necessary crossings no street surface railroad company shall construct, extend or operate its road or tracks in that portion of any street, avenue, road or highway in which a street surface railroad is, or shall be, lawfully constructed, except with the consent of the company owning and maintaining the same, provided, however, that any two or more railroad companies now existing, or hereafter formed under the provisions of this act, may join and unite and use each others' tracks for a distance not exceeding one thousand feet, whenever the court upon an application for the appointment of commissioners, next hereinafter provided, shall be satisfied that such use is actually necessary to connect main portions of a line to be constructed as an independent railroad, and that the public convenience requires the same, in which event the right of such use shall be given only for a compensation, to an extent and in a manner to be ascertained and determined by commissioners to be appointed by

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the courts, as provided in respect to acquiring title to real estate under chapter 140 of the Laws of 1850, entitled 'An act to authorize the formation of railroad corporations, and to regulate the same,' and the several acts amendatory thereof; or by the board of railroad commissioners in cases where the companies interested shall unite in a request for such board to act. Such commissioners, in determining the compensation to be paid for the use by one company of the tracks of another, shall consider and allow for the use of tracks and for all injury and damage to the company whose tracks may be so used." And by its very plain language it has been made impracticable, as the facts have been made to appear, for the petitioner to construct or maintain a surface railroad over so much of these streets as have been already devoted to the construction and operation of the other street surface railroads. To that extent the act is very plain, and was designed to prevent the construction and operation of competing surface railroad lines against the consent of the companies whose railroads have been previously constructed and are still in operation. The intention and object of the section throughout have not been declared in such language as to be entirely free from ambiguity, but upon this particular subject no ground has been left for misapprehending the intention of the legislature. It has, however, been suggested that the legislature did not possess the authority under the constitution to provide or impose this restriction or disability, but the constitution has nowhere, either in express words or by reasonable implication, deprived the legislature of this power. It has, on the contrary, by section 18 of article 3, invested the legislature with plenary authority to pass general laws, providing for all the cases enumerated in this section, and one of those cases which cannot be provided for by a special law is that of granting to any corporation, association or individual, the right to lay down railroad tracks. But it was made the imperative duty of the legislature to pass general laws providing for that object, and chapter 252 of the Laws of 1884

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is one of the acts which has been passed by the legislature to provide for the construction and operation of railroads.

Neither this portion of the constitution, nor any other, has further abridged the power of the legislature than to declare that "no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value (of) the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the general term of the supreme court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination confirmed by the court may be taken in lieu of the consent of the property owners." With these specified restrictions as to the laws which should be passed the constitution has not undertaken to declare or define what the act may contain or be included in it. It cannot permit a street railroad to be constructed or operated except upon a compliance with these requirements. So far a disability has been imposed upon the legislature and its legislative authority has been limited, but beyond that no restriction over this subject has been placed upon its legislative power. How the end intended to be accomplished should be secured after the observance of these restraints, was necessarily left to the judgment and discretion of the legislature. For so far as the act may be made to include subjects not within these specified restraints, it would clearly be within the broad grant of legislative authority made by the constitution to the legislature. And that includes all legislative authority of every description not restricted or abridged by some express or implied prohibition of the constitution.

This subject was considered in *People agt. Flagg* (46 N. Y., 401), where it was said, in the opinion of the chief judge, with

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the concurrence of all his associates, that "all legislative power is conferred upon the senate and assembly; and if an act is within the legitimate exercise of that power, it is valid, unless some restriction or limitation can be found in the constitution itself. The distinction between the United States constitution and our state constitution is that the former confers upon congress certain specified powers only, while the latter confers upon the legislature all legislative powers. In the one case the power specifically granted can only be exercised. In the other all legislative powers not prohibited may be exercised" (*Id.*, 404). And *Bank of Chenango agt. Brown* (26 *N. Y.*, 467) is to the same effect.

So much of the enactment as is contained in section 14 of chapter 252 of the Laws of 1884 is clearly an appropriate exercise of legislative power. It was entirely judicious for the legislature to prohibit the construction of another railroad in the public streets of a city, so far as they might previously have been occupied for that object by other companies acting under the sanction and authority of the law. And no refined or purely artificial distinctions can be permitted to stand in the way of the exercise of this legislative authority.

This subject was also considered by the same chief judge in *People agt. Comstock* (78 *N. Y.*, 356), where it was held that "it must be borne in mind that the senate and assembly possess all legislative power, except when forbidden or restricted by other provisions of the same instrument, and hence it is necessary in order to successfully challenge the constitutionality of an act of the legislature within the purview of legislative power, to find some provision which either restricts or prohibits the power which it has exercised. Every presumption is in favor of its validity" (*Id.*, 361).

Between this section and the constitution there is neither a direct or manifest conflict, for it in no manner restricts, limits or enlarges what the constitution in any form has declared shall or shall not be done. There is no provision either in this portion or any other part of the constitution which has

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declared expressly, or by implication, that a railroad company shall be entitled to construct and operate its railroad over that portion of a public street in a city which has already been devoted to or appropriated by another railroad. These provisions of the constitution have wholly been directed to other subjects. Their object has been to prevent the construction of railroad tracks under the authority of a special law, and to require it to be done through the instrumentality of a general law. And even when a general law may be enacted, before a railroad can be constructed under its authority, it has been made requisite that the consent of the owners of one-half in value of the property bounded on that portion of the street or highway upon which it is proposed to construct or operate the railroad, as well as the consent of the local authorities having control of that portion of the street, shall be first obtained. And if the consent of such owners cannot be obtained, then the general term of the supreme court may appoint three commissioners, whose determination, confirmed by the court, shall stand in the place of the consent of the property owners. So much has been required for the observance of these provisions of the constitution, but no more than that has in any form been declared. And consequently the entire range of legislation beyond that was within the authority, judgment and discretion of the legislature itself. And the prohibition which is now under consideration was plainly within that extent of legislative power, for it has not been declared that the legislature could make no further requirements than those declared by these provisions of the constitution. All that has been declared is, that these restraints shall be observed, and beyond them what further may be required for the protection of either public or private interests, has necessarily been confided to the good sense of the legislature. Over these streets it has control, and could determine and declare, as it has by this enactment, what further restraints should be imposed upon a street railroad company before it should have the right or privilege of using the streets for the construction

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and operation of its railroad tracks. This part of the act, therefore, cannot be disregarded as a violation of any of the provisions or restraints of the constitution, but it should be considered a proper and judicious exercise of legislative power, and as such required to be observed by the court in the disposition of this application. And as it has been made entirely evident from the fact that the consent of these other railroad companies has been withheld from the construction of the applicant's proposed road, that the appointment of the commissioners to hear and determine the parties interested and report whether the railroad ought to be constructed would be entirely futile, the application should not be allowed to prove successful.

It has been suggested that the court has no discretion which it is at liberty to exercise upon this subject. For by section 5 of chapter 252 of the Laws of 1884 it has been provided that upon due proof of the service of the notice required to be given, the general term "shall appoint three disinterested persons who shall act as commissioners." But that this was not intended to be mandatory is quite clear from the preceding portions of the act. For if upon mere proof of service of the notice it should become the unqualified duty of the court to appoint the commissioners there could be no useful object whatever in requiring it to be served. It would be no less than absurd to require a notice to be given to the parties opposed to the construction and operation of the railroad, and upon their appearance before the court to deny them the right to object, as that would be denied if the commissioners must be appointed upon mere proof of service of the notice. That could not have been the design of the legislature. But what was intended, as has already been observed, was that the property owners opposing the construction of the railroad should be afforded an opportunity of resisting the application for the appointment of the commissioners, and to extend this opportunity to them this notice was required to be served. The act, therefore, although in form mandatory, is required to be

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construed as merely authorizing the court to appoint the commissioners if the exercise of that authority shall appear discreet and just after hearing the parties opposed to the construction of the railroad. And that this was the design of this portion of the law is made further evident from the provisions contained in the constitution itself, for by those provisions it has been declared that the general term "may" upon application appoint the three commissioners. And it is not to be supposed as long as a different construction is well warranted by this portion of the act that the legislature designed to render the duty of the court any more imperative than that had been prescribed by the constitution itself. The rule of construction, on the contrary, would require the act as that may be done, in view of its other provisions, to be harmonized with the constitution, and to leave the power to be exercised by the general term discretionary in its nature.

Instances do undoubtedly arise where the word "may," which has been employed as descriptive of the powers of the general term over this subject, has been construed to be mandatory and of the same effect as the word "shall." But that construction has not been given to the word "may" when it has been employed as it is in this part of the constitution of the state. For by no part of that which precedes or follows this delegation of authority has the constitution employed language indicating it to be the duty of the court to appoint the commissioners as a matter of course where the consent of a majority of the property owners cannot be obtained. And it is a remarkable fact that under the constitution, with very slight exceptions this word "may" has only been employed when it was intended that the power to which it referred should be of a discretionary character. Section 8 of article 1 and 7 of article 5 seem to be exceptions to this rule, but in other cases, where the intention has been manifested that the directions of the constitution shall be imperatively carried into effect, the word "shall" has with great uniformity been employed. More care in this respect

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has been observed than is usually applied to the enactment of statutes. And as the word "may" has been so understandingly employed in the constitution, it must be allowed to have its ordinary force and effect in its provisions where, from the subject-matter to which it relates, or from the context, no different intention has been manifested. In this part of the constitution the word seems to have been used in the ordinary understanding of its signification, and it stands immediately in contrast with the declared duty of the commissioners after they shall have been appointed, concerning whom it has been said that they "shall determine" after a hearing, etc., whether the railroad ought to be constructed. Even if this language had been included in the enactment of a statute, it would require the same construction to be given to it. For it is a rule of construction which has been applied to this particular word that "the ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions" (*Miner agt. Mechanics' Bank, etc.* (1 *Peters*, 46, 64).

No antecedent duty has been required to be carried into effect by this provision of the constitution, and no existing public or private interest has been designed to be specially protected by it. And for that reason also this construction of the word "may" is clearly warranted. In the cases where it has been differently construed that construction has been given to it to carry into effect what under the circumstances was justly considered to have been the intention of the legislature, where the power conferred has been provided for rendering a duty effectual or for promoting the ends of justice, or securing public or individual interests, there the term has been construed to be mandatory. But where it is merely indifferent whether a thing shall be done or not, then the word "may" in an act is usually construed to confer a permissive authority. But where the public interest or private right requires that the thing should be done, then the word "may" is generally construed to mean the same as "shall"

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(*People* agt. *Supervisors*, 68 *N. Y.*, 115, 119; *Hagadorn* agt. *Roux*, 72 *N. Y.*, 583, 586; *People* agt. *Supervisors*, 51 *N. Y.*, 401).

From the manner in which this word "may" has been used in this part of the constitution, and its relation to the subject provided for, it can therefore only be construed as designed to have been permissive and to empower the court, upon the application for the appointment of commissioners, to determine whether the appointment should be made or not. And where, as in the present case, it has been made entirely evident that the proposed railroad cannot be lawfully constructed by reason of the refusal of other railroad companies already lawfully occupying the streets with their tracks to consent to its construction, the appointment of commissioners should not be made; for the hearing and report, if it should be favorable to the applicant, would, under this prohibition of the statute, be entirely without effect; and it could not have been intended by the constitution that an appointment necessarily resulting in that manner should be made at all.

It has also been shown by the affidavits produced on behalf of the contestants that the amount of travel upon the portion of Thirty-fourth street bounded on the east by Lexington avenue and on the west by Sixth avenue is so slight as not to require for the convenience of the public the construction of this railroad. It has been further shown that the street is not at this time adapted to any prospective purposes of business, but so far must continue to be used for private residences; that the value of the private property within these boundaries is the sum of about ten millions of dollars, which, in the judgment of persons familiar with it, would be depreciated to the extent of three millions by the construction and operation of a railroad between these points. These facts have not been denied, and must for that reason be regarded as having been established by the affidavits. And they supply a further as well as a very urgent reason for rejecting the application now made to the court. Under all the facts as they have been presented

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that seems to be the plain course of duty. And as this court is required to exercise its judgment upon the propriety of the application, and the commissioners cannot, as the law has been enacted, be appointed with benefit to the applicant or advantage to the public, and the property of the abutting owners on this portion of the street would be seriously depreciated by its success, the application which has been made should be denied.

BRADY, J., concurs.

DAVIS, P. J. (*dissenting*).—It is due to the elaborate and able opinion of my brother DANIELS that I should state the reasons that prevent my concurrence in his views and conclusions. This I shall do briefly and so far as practicable without elaboration. I agree that the statute is to be so construed as to harmonize with the provision of the constitution, and that the use of the words "shall appoint," as they appear in the statute, does not present a case of excess of authority by the legislature, because the constitution uses the words "may appoint." On the contrary, it is the duty of the courts to regard these several phrases as expressing the same idea, to wit, the duty of the general term of the supreme court to carry out the plan of the provision of the constitution whenever an appropriate case for its execution is presented to the court. Neither phrase was used for the purpose of conferring on the court any power beyond that essential to set in motion the machinery contemplated and authorized by the constitution. The provision of the constitution was intended to interdict absolutely all special laws for the creation of such railroad corporations as are within its description and within the mischiefs aimed to be prevented, and at the same time to provide by general laws for an effective mode of securing the construction of railroads by corporations created thereunder whenever the public exigencies or necessities demand. For the construction of street railroads two things were made primarily essential; first, the consent of the public authorities having jurisdiction of the streets to be occupied; second,

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the consent of the owners of the real property abutting on the several streets to be affected. But as it was manifest that it might occur that the abutting owners might refuse assent owing to real or supposed local injuries in cases in which the greater public interest would require the construction of the road, notwithstanding such refusal, the constitution provided for such cases by creating a special forum in which the question whether the railroad ought to be built notwithstanding the refusal could be fully and fairly tried, and in which forum such owners and all parties interested in the general question should be entitled to be heard, in and by all the familiar modes of trials of questions of fact, before such a body, and whose report and determination, if favorable to the construction, when confirmed by the general term, should stand in place of the consent of such owners. Power was therefore conferred by the constitution upon the general term of the supreme court, in a case where the consent of a majority of the owners along a street in the line of the proposed railroad could not be obtained, upon proper presentation of that fact, to appoint three suitable commissioners to hear, try and determine the question whether the road ought to be constructed notwithstanding the inability to procure such consent. The scheme is a very simple one. It confers upon the court primarily a naked power of appointment of commissioners for a clearly specific purpose. It gives no power to the court to hear, try or determine in the first instance the question that is to be sent to commissioners. That power is given to the commissioners alone; and it is only when their report, with the evidence laid before them and the reasons assigned by them for their conclusion, are brought before the court for confirmation that the plan of the constitution permits the court to exercise jurisdiction or discretion over the question submitted to the commissioners, whether the road ought to be constructed notwithstanding the antagonism of abutting owners.

It is thought and argued that because notice is required to

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be given to the non-consenting owners of the application for commissioners, therefore such owners may be heard by the general term, not only on the question whether a case is shown by the petitioners in which the constitution authorizes and directs the appointment of commissioners, and upon the question who are suitable persons to be appointed, but also on the very question which the constitution directs to be submitted to the commissioners. In other words, it is claimed that the constitution is to be read as though it provided that the question whether the road ought to be constructed without the consent of the abutting owners shall be sent to commissioners, if the court shall first decide on a hearing of the parties interested that it ought to be so built. That this is not the meaning of the constitution is manifest to my mind, because no adequate means are provided for such a hearing by the general term in the first instance. Nothing is provided for but the presentation by proper proofs of the fact that a majority of abutting owners have refused to consent, or rather that their consent cannot be obtained, and that they have been duly notified of the application for the appointment of commissioners. These two facts being satisfactorily established clothe the general term with jurisdiction to do only what the constitution enjoins, to wit, to appoint commissioners. The owners and other parties notified, or being in interest, may come in and be heard on the questions thus presented. They may show that consents have been given, and therefore no commissioners are necessary, or that consents have not been properly applied for or have not been refused; or any material facts bearing upon those questions; or any fact touching the suitability of persons named or to be named as commissioners. In other words, they may contest the questions presented by the application and material to the right claimed by the petitioners to have commissioners appointed, on the ground of inability to get consent of a majority of owners along the street; but they are not at liberty to try before the court on their *ex parte* affidavits, or otherwise, the question to

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be tried under the constitution by the commissioners alone. The court are not commissioners, and are not recognized as such by the constitution or the law. They are at this stage of the proceeding a mere part of the scheme of the constitution through which commissioners are to be called into existence and set in motion to hear and determine the grave question which the constitution commits primarily to them alone. The general term, in doing this, act administratively rather than judicially. For the court to undertake to try and decide the question whether or not the railroad ought to be constructed notwithstanding the refusal of owners as one that shall control the appointment of commissioners, as it may hold upon it favorably or adversely to the construction of the road, is, in my opinion, mere usurpation. I am not considering whether or not my brother DANIELS has reached a correct conclusion, upon the *ex parte* affidavits before us, that the railroad of petitioners ought not to be constructed, because, firstly, I think the court has no power, at this stage of the proceedings, to pass upon that question; secondly, if it had power it ought not to be exercised upon *ex parte* affidavits, and without the trial contemplated by the constitution, at which witness can be orally heard and examined, and the opportunity given to both or all sides to present proofs, reasons and arguments, as they shall be advised. The trial of the general term on the papers now before it, resulting in a refusal to appoint commissioners, seems to me a mere travesty of the scheme of the constitution, which we are bound to respect and protect. The reasons urged for our denial of the appointment by my learned brother may with great propriety be urged before the commissioners, and be held, if they think them well founded, sufficient to warrant an adverse report; but we have nothing to do with them in the form of triers till they come before us as the report of the commissioners, with the proofs duly taken first passed upon by them. This was the course taken by the general term in the Broadway railroad case, and after the commissioners had made their report the general term pro-

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ceeded to consider its propriety upon the evidence and facts reported, and to affirm the same against my dissent. The same course as to the form of procedure should be taken here, for this court will ultimately, on the coming in of the report, &c., have jurisdiction to confirm or reject the conclusions of the commissioners as shall seem equitable and just to its constitutional discretion. But it is urged, and elaborately argued, that the general term should deny the appointment of commissioners, because it appears that other street railroads are constructed and in operation upon some other portions of the projected route of the petitioners, and it is not shown that they have consented to the construction of the petitioners' road along the portions of the route so occupied by such other street railroads. It is first to be observed that the existence of such roads is in itself no objection to the construction of other roads. The sting of death is supposed to be in the want of the consent to construct another road in the same street. Affidavits are produced to show that such consent has not been obtained, and as the affiants believe will not be given. There is nothing in the law to make it essential to obtain such consent before it shall be tried, determined by commissioners whether the railroad ought to be constructed, notwithstanding the refusal of consent by abutting owners of some street or streets on its route; nor is that fact any valid reason for refusing to appoint, because, *non constat*, that after it is found (if it shall be) that the road ought to be built, the other railroads will persist in refusing consent. The presumption ought to be that when it is shown that the public interest requires that another railroad should be constructed to accommodate another route, the mere fact that in doing so, it must pass along some portion of a street already occupied by an existing railroad will not be seized upon by the latter company to defeat a public demand. But the argument stands upon the popular faith that a corporation of this character is a concentration of human selfishness freed by law from all moral responsibilities, and therefore the present occu-

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pying railroads will withhold consent forever. This assumption is easily overthrown when the fact is recalled to mind that no such corporation was ever known to stand out long against its own interests; and whenever it is made to appear that it is for the interests of the occupying railroads to consent, those companies will speedily show that "one refusal's no rebuff."

It is the right, therefore, of the petitioners, if they can do so, to put themselves in the position to apply for the consent of the other railroads in an effectual way, and test the question whether it can be rightfully refused or cannot be obtained by suitable arguments or arrangements. To treat the assertion made on *ex parte* affidavits that such consent cannot be obtained as conclusive of all right of a newly projected railroad to construct a public improvement is, in my judgment, against public policy, and eminently injurious to all improvements. It is to establish by a judicial act a most dangerous and fatal monopoly, which may be wise in this case, but in some cases would result in vesting an inefficient and contemptible railroad, which has lawful possession of a few rods of a street through which a most important public improvement must pass, with power to defeat and forever prevent its construction, and also from trying the question whether or not it ought to be constructed in the mode provided by the constitution. The petty horse railroads of this city ought to have no such absolutely controlling power. Their modes of locomotion are destined ere long to give way to more rapid, cleanly and healthy kinds of travel, to the relief both of man and beast on the cars, and to the great advantage of the traffic and commerce of the city and the well being of its citizens. I am not content to hold that a constitutional proceeding by a newly projected railroad corporation to try a question affecting one street, however important it may be, can be defeated altogether by the present refusal of a railroad now in possession of a portion of some street on its general route. The rule sought to be applied to this case will neces-

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sarily have that effect in all cases; and ought not, therefore, to be applied. For nothing is more injurious to public interests than to clothe our present street railroads with an absolute veto of all the probable or possible advances of science and invention in the modes of using public streets.

I do not doubt that this objection, with all others suggested, may be presented to the commissioners, who will have full opportunity to examine into all the force and effect that should be allowed to it; and that it may, if the facts of the case seem suitable, be deemed by them a sufficient reason for an adverse report (in which case this court can review their conclusion); but it ought not to be established as a fatal bar to a motion for an opportunity to be heard before a commission on that and the other questions involved in the application.

If we hold in accordance with the views expressed and urged by my brother DANIELS, it will be of no consequence that every person owning lands abutting the street or part of a street occupied by the non-consenting railroad has consented and is anxious to have the projected road constructed, or that the street is so wide that both can be amply accommodated without injury to either, or that the new road will accommodate vast numbers of people, while the old one is a mere nuisance to the general public. For the decision will clothe it under the law with a monopoly gross and odious — a chartered counterpart of the fabled “dog in the manger.”

I do not now discuss what I consider to be a very grave question, whether the legislature has power under the constitutional provision to turn over to any existing corporation the absolute and final right to say whether or not a like corporation may be created and exist for the public benefit. What is done by the act under consideration is to empower one corporation organized for a public use and authorized to occupy a public street in the exercise of its functions to declare that under no circumstances of public necessity, though all the public authorities having jurisdiction of the street consent, and all the people interested in the subject-matter agree to its

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benefit and necessity, shall any other railroad occupy any portion of the same street. It is true the legislature is omnipotent in legislation where not expressly or by necessary inference restrained by the constitution. But legislating by itself is one thing and making over its power of legislation to another body or corporation is another and different thing. And especially is this so where the power conferred upon a corporation is to declare and make itself an absolute monopoly to take and hold against all comers the right to use a public street when the interests of the public require its use to be extended to another similar corporation. The legislature may undoubtedly enact by law that but one railroad shall exist in any one street; but it may well be doubted if it can enact that an existing corporation shall have the power of absolute control of that same question. The point would be sharply presented if in enacting the general railroad law the legislature had enacted that no railroad parallel to that of the Hudson River and New York Central Railroad Company should ever be constructed from New York to Buffalo without the consent of that corporation. Such an abdication of legislative functions would be handing over to a railroad corporation a most important legislative power, which the constitution requires to be exercised by the legislature only, and would in spirit be strictly hostile to that provision of the constitution which forbids railroads to be constructed by special law, but allows their construction under the general law, and prescribes the mode of obtaining consent of owners and the process to be substituted for such consent for determining whether they ought to be built. To subordinate the constitutional provision for meeting the demands of public interest and necessities by the construction of street or other railroads to the will of existing corporations with which they may come into competition is a mockery of its plain intention; for under the general laws authorized by the constitution the question must always be what do the public interest require, and not what does some existing corporate monopoly consent to. The con-

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stitution intended to open such questions by general laws to all the people, and not to shut them forever for the benefit of existing corporations, and legislation to accomplish that defeats the intent and object of the constitution. I am not able, therefore, to concur with my brethren. On the contrary, I think the only subject for the general term to pass upon now is whether the petitioner has shown that a majority of owners along that part of the route under consideration have refused to consent to the construction of the petitioner's railroad.

The commissioners must, in the first instance, take care of all these questions, subject, of course, to the power of the general term, which is most ample to review their report whenever it comes in as shall then appear to be just and equitable. It is, I think, well settled law that where a duty to appoint commissioners to hear and determine a specified question is conferred by statute upon a court or any other body, upon the presentation of certain facts, the duty is so far administrative in its nature that the obligation becomes imperative, even though the language used by the statute might, under other circumstances, be regarded as conferring a mere discretion (*People agt. Supervisors*, 68 *N. Y.*, 115; *Haggadorn agt. Runa*, 77 *N. Y.*, 583; *People agt. Supervisors*, 51 *N. Y.*, 401).

Such action does not, in any sense, permit the appointing body (where authority to review the action of the commissioners is conferred), upon any question whatever beyond that of the sufficiency of the proofs showing that the fact exists, which authorizes the court or body to appoint commissioners. I think the affidavits presented in this case do show that the consent of a majority of the property owners of that part of the route of the petitioners' proposed road affected by this proceeding cannot be obtained, and the petitioners are entitled to have commissioners appointed. For these reasons I dissent from the denial of the motion.

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SUPREME COURT.

WILLIAM S. COON agt. HIRAM DIEFENDORF.

Ejectment — Costs — Code of Civil Procedure, section 3234.

Under section 3234 of the Code of Civil Procedure the same rule prevails in ejectment as in replevin.

Where in an action of ejectment the complaint contained but one count to recover two separate parcels of land, separately described in the count, and as to both parcels the plaintiff's right to recover was put in issue by the answer, the verdict of the jury being in favor of the plaintiff as to one parcel, and in favor of the defendant as to the other, the defendant is entitled to costs as well as the plaintiff.

Monroe Special Term, July, 1885.

MOTION by defendant for an order directing the clerk to tax the defendant's costs, and that the amount thereof be set off against the same amount of plaintiff's costs.

C. M. Allen, for motion.

Geo. D. Forsythe, opposed.

ANGLE, J. — The complaint contains but one count, and is in ejectment to recover two separate parcels of land, separately described in the count, and as to both parcels the plaintiff's right to recover was put in issue by the answer. The verdict of the jury was in favor of the plaintiff as to one parcel, and in favor of the defendant as to the other parcel. The plaintiff has perfected judgment in his favor for the recovery of the parcel found for him and for his costs against defendant, and the clerk has refused to tax defendant's costs against plaintiff.

The question is as to the construction of section 3234 of the Code of Civil Procedure, which provides that when the complaint sets forth separately two causes of action upon which issues of fact are joined, if the plaintiff recover upon one or more of the issues, and the defendant recover upon the other or others, each party is entitled to costs against the adverse

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party, unless it is certified that the substantial cause of action was the same upon each issue, in which case the plaintiff only is entitled to costs. This provision, as far as the present question is concerned, is substantially the same as the provisions of the Revised Statutes (*Ackerman* agt. *De Lude*, 20 *Weekly Dig.*, 544), and the provisions of the Revised Statutes were construed in *Seymour* agt. *Billings* (12 *Wend.*, 285), in which it was held that, as the law stood before the Revised Statutes, where the declaration in replevin contained only one count for a variety of articles, and a plea of property was interposed by the defendant, and the jury found the property of a portion of the articles to be in the plaintiff, and that the value thereof exceeded fifty dollars, and the property of the residue of the articles in the defendant, and that the value thereof was ninety dollars, each party was entitled to costs against the other. On page 287 the court say: "The jury under the form of pleading having found the title of a part of the property replevied by the plaintiff to have been in the defendant, and the title of the residue in the plaintiff, effect must be given to the verdict in the same manner as though the declaration had contained two distinct counts for the respective parcels, or the defendant had averred for each respectively. Each party then, in this case, has a substantial issue found in his favor, and the general rule in the action of replevin seems to be that each party shall have costs of the issues on which he succeeds. Both are considered as plaintiff's or actors (*Wright* agt. *Williams*, 2 *Wend.*, 642). But under the Revised Statutes this is made the general rule applicable to all actions" (2 *R. S.*, 617, *sec.* 26).

In *Martin* agt. *Martin* (3 *How.*, 203), the special term declined to consider *Seymour* agt. *Billings* as authority beyond the action of replevin, and held it inapplicable to ejectment. In *Stoddard* agt. *Clarke* (9 *Abb. [N. S.]*, 314), the court of appeals say that the court held in *Seymour* agt. *Billings* that, "the declaration although it contained only one count for a variety of articles being regarded, for the purposes of costs as

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containing two distinct counts for the respective parcels of property."

In *Ackerman agt. De Lude (supra)*, the general term in this department in construing section 3224 followed *Seymour agt. Billings*, and went upon a principle of construction applicable with stronger reason to such a count in ejectment as in the case before me, than to a count in replevin for different articles of personal property. The above quotation from *Seymour agt. Billings* shows that the court was of opinion that the Revised Statutes had made the rule theretofore prevailing in replevin applicable in all actions. True, this part of the opinion is *obiter*, for the court had already decided in that case that the defendant was entitled to costs as the law stood before the Revised Statutes, and it was immaterial whether the statute had extended the same rule to other cases.

My conclusion is, that under section 3234 of the Code the same rule prevails in ejectment as in replevin, and I am therefore constrained not to follow *Martin agt. Martin*.

The motion is granted without costs.

CITY COURT OF BROOKLYN.

WILLIAM FLANAGAN, respondent, agt. BENJAMIN C. HOLLINGSWORTH and MATHEW RYAN, appellant.

Deed — Covenant against nuisances — Construction of.

A livery stable would not be offensive to a neighborhood within the meaning of a covenant not to erect any building for or to carry on upon certain premises certain enumerated trades, cow stables or hog pens, "or any other dangerous, noxious, unwholesome or offensive establishment, trade or calling, or business whatsoever." The word "cow" before "stables" limited the establishments prohibited of the same class, and the words "other," &c., do not include stables where domestic animals are to be kept.

General Term, October, 1885

Before CLEMENT and VAN WYCK, JJ.

Flanagan agt Hollingsworth.

Erastus New and *N. C. Moak*, for plaintiff.

J. T. Moreau and *Morris & Pearsall*, for defendants.

CLEMENT, J. — The plaintiff and the defendant Hollingsworth each own real property in the same vicinity in Brooklyn, and derive their several titles from a common source, and both parcels are subject to covenants against nuisances which were made in the deeds given by the parties who owned the common title. The covenant reads as follows:

"I, the party of the second part, in the within indenture named, in consideration thereof and of the sum of one dollar to me in hand paid by the said party of the first part in said indenture named, do for myself, my heirs and assigns, hereby covenant to and with the aforesaid party of the first part, her heirs, executors and administrators, that neither I nor my heirs or assigns shall or will at any time hereafter erect, permit or allow to be erected or carried on upon the premises described and granted in said indenture, or any part thereof, any brewery, distillery, slaughter-house, smith shop, furnace, steam engine, brass foundry, nail or other iron factory, sugar, bakery, cow stable, hog pens, or any soap, candle, oil, starch, varnish, vitriol, glue, ink, turpentine or lamp-black factory, or any factory or establishment for the tanning, dressing or preparing of skins, hides, or leather of any other dangerous, noxious, unwholesome or offensive establishment, trade or calling or business whatsoever."

The defendants were about to erect on the lots owned by Hollingsworth a livery stable, and thereupon plaintiff brought this action to restrain its construction. The court at special term held that a livery stable would be offensive to the neighborhood within the meaning of the mutual covenants, and granted a perpetual injunction restraining the defendants from the erection of the stable or from using any building hereafter erected on said premises for such a purpose. Assuming that the plaintiff can take the benefit of the covenant and enforce its provisions, and also assuming as

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matter of fact that a livery stable is offensive, we are then called upon to decide whether such a business, is prohibited by the covenant under the last clause "or any other * * * offensive establishment, trade, calling or business." It was found as a fact in the case that in the year 1866, when the covenant was made, a livery stable was a familiar and common object in the city of Brooklyn, and the parties when they made their contract had that fact in view, and after deliberation determined that cow stables should be prohibited in so many words. They named certain trades which should not be permitted and added the last general clause in order to prevent any other which would be in the same degree as those already mentioned, dangerous, noxious, unwholesome or offensive.

The learned counsel for the plaintiff contends that public horse stables were forbidden by the covenant. He concedes that private horse stables were permitted. Stables, whether used for the keep of horses or cows, are all of one class or kind, and a private horse stable is equally offensive as a livery stable, provided the same number of horses are kept in each. A private stable where the owner kept ten horses would be more disagreeable to the neighborhood than a public one containing five.

It is proper on this point to refer to the testimony of the leading expert witness called by the plaintiff. He testified "any stable where a large number of horses are kept, even though kept well as it can be, depreciates the value of surrounding property." The witness describes the objections to a stable where "a large number of horses are kept" and the evils complained of are odors, noise, rats and flies. A stable is more or less offensive according to its size and the number of horses kept. While it is true a public stable usually contains more horses than a private one, yet it is offensive, not because the horses are let for hire or stabled for outside owners, but because it contains a large number of horses. The word "offensive" in the covenant included all establishments, trades, callings or business of a different class than

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those already recited which are disagreeable to the senses in the same degree (*noscitur a sociis*), but it does not include trades of the same class which has been already named.

If stables had been prohibited in so many words, then the general words would not refer to them, and we think that the use of the word "stables" has the same effect though it is preceded by the word "cow." That word limited the establishments prohibited of the same class, and the words "other, &c.," do not include stables where domestic animals are to be kept.

The parties could have prohibited all stables by omitting a single word. Effect should be given to all the words of a contract if possible, and if the parties prohibited one of a class they considered all of that class, and intended to prohibit those mentioned and not others of the same class. Those who made the covenants agreed that livery stables were not offensive, and the conclusion arrived at by them is binding upon their grantees. The authorities on this question seem clear and to the point.

In *Baker agt. Ludlow* (2 *Johns. Cas.*, 239) the words used in a policy of marine insurance were as follows: "It is agreed that salt, grain of all kinds, Indian meal, fruits, cheese, dried fish, vegetables, and roots and all other articles perishable in their own nature, are warranted by the assured free from average unless general." A question arose as to pickled fish which formed part of the cargo.

The court say: "By the terms of the memorandum fish in general were not intended to be included, and the expression dried fish implies that other fish were not intended." It was also held that the subsequent words "all other articles perishable in their own nature" were not applicable to the articles previously enumerated nor could they repel the implication arising from the enumeration of them.

In the case of *Hare agt. Horton* (5 *Barn. & Adol.*, 715), A. granted by mortgage to B. an iron foundry and two dwelling houses and the appurtenances, "together with all

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grates, boilers, bells and other fixtures in and about the said two dwelling houses." The court decided that the conveyance of the foundry, if nothing else had been expressed, would have passed, the title to the fixtures, but the mention of the articles in the two dwelling houses showed that it was the intention of the parties that the fixtures in the foundry were not conveyed.

Lord MANSFIELD, in construing the act of 43 *Elizabeth* (*chap. 3, sect. 1*), which required the overseers of the poor to tax every occupier of lands, coal mines and salable underwoods, in a case where it was sought to tax the occupier of lead mines, observed (*The Smelting Company agt. Richardson, 3 Burr., 134*) that the words of the act "are coal mines, not mentioning any other kind of mines, and that is equal to an express exception or exclusion of all other mines" (*See, also, The King agt. The Inhabitants of Sedgley, 2 Barn. & Adol. 65*).

In *Parsons on Contracts* (*vol. 2, 516*) the rule as to construction of contracts is stated as follows: "If, however, there be many things of the same class or kind, the expression of one or more of them implies exclusion of all not expressed, and this even if the law would have implied all if none had been enumerated."

For the reasons above given the judgment appealed from must be reversed and a new trial granted, costs to abide the event.

VAN WYCK, J., concurred.

Farnam agt. Barnum.

SUPREME COURT.

AMELIA L. FARNAM, plaintiff, agt. WILLIAM M. BARNUM and CHARLES N. FARNAM, as administrators with the will annexed of HENRY PARSONS FARNAM *et al.*, defendants.

Action—Parties—When one or more parties may sue or defend for the whole—Code of Civil Procedure, section 448—Complaint—Demurrer.

An action may be brought by one of the next of kin of a deceased person "on behalf of herself, and also for the benefit of all the heirs-at-law and next of kin of the said deceased, who will come in and contribute to the expenses," against the personal representatives of the testator, to procure an adjudication upon the validity of his will, and to have a trust declared and established in favor of said heirs-at-law and next of kin, as against the administrators with the will annexed and for equitable relief.

One next of kin may maintain an action of this character for the benefit of all.

Where the question is one of a common or general interest of many persons, or where the persons who may be made parties are very numerous, it being impracticable to bring them all before the court, then one may sue for the benefit of all. The word "*many*" is not used in section 448 of the Code of Civil Procedure to express the idea of *very numerous* persons. There are two classes named, where one may sue for all. One is, where many persons have a common interest and another where the parties are so numerous that it is impracticable to bring them all before the court. While the word "*many*," as here used, contemplates more than one, it does not necessarily *very numerous persons*, while the word "*many*" as ordinarily used is synonymous in meaning with "*numerous*." As used in this section, in connection with the words "common or general interest of the persons," it means a limited number. It is the character of the interest which controls rather than the number of persons. The third class mentioned "*very numerous*," one is allowed to sue for all, as a matter of convenience in the administration of justice by the court.

Actions against administrators, as well as actions against assignees for the benefit of creditors, brought to set aside an assignment, are exceptions to the rule that all parties having an equitable interest named by the decree, are necessary parties thereto.

On a demurrer to a complaint the test of the unity of interest intended by

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the 448th section, is that the joint connection with or relation to the subject-matter, which by the established practice of the common-law, courts will preclude a separate action.

New York County, Special Term, May, 1885.

THIS action is brought by the plaintiff on behalf of herself, and also for the benefit of all the heirs-at-law and next of kin of Henry Parsons Farnam, deceased, who will come in and contribute to the expenses of the action.

The defendants' administrators demur to the complaint upon the ground that it appears upon the face of the complaint that there is a defect of parties plaintiff or defendants, in that Charles N. Farnam, individually, and Sarah N. Burr and Mary N. Farnam, who in the complaint are alleged to be with Amelia L. Farnam, the only heirs-at-law and next of kin of the said deceased, are not made parties to the action.

Louis A. Chandler (Dill & Chandler), for plaintiffs, made and argued the following points:

I. The right of the next of kin to maintain this action is established by authority (*Wager agt. Wager*, 89 *N. Y.*, 161). No objection is made on this ground. The sole question here is whether one can sue for the benefit of all.

II. One next of kin may maintain an action of this character for the benefit of all (*Code, sec. 448*). Section 448. Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons, or where the persons who might be made parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. This section is substantially a transcript of section 119 of the Code

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of Procedure, as it was enacted in the year 1849. The last clause of section 119: "And where the question is one of common or general interest of many persons * * * one or more may sue for the benefit of the whole," is almost identical, word for word, with the section above cited (*Laws of 1849, p. 639, sec. 119*). The same question here presented arose in 1851 under a demurrer for defect of parties. Mary McKay left a will giving legacies to four persons named, and devising her estate, real and personal, to three other persons, charged as it was claimed with the payment of said legacies. One of the four legatees brought one action in equity for the benefit of all, against the administrators, with the will annexed, and the residuary devisees, alleging that the personal estate was insufficient to pay the debts and demanding judgment that the will be established and an account be taken; that the real estate be sold and the proceeds, together with the personal estate, might be applied in due course of administration in payment of the debts and legacies. To this complaint the residuary devisees demurred, on the ground that the other three legatees should have been made parties, plaintiff or defendant. The special term sustained the demurrer, but the general term reversed that judgment and overruled the demurrer holding that the intention of the legislature was to retain the former practice of the court of chancery, and that, when the question was one of common or general interest to several persons, the action might be brought by one or more for the benefit of all who have such common or general interest, without showing that the parties are very numerous, or that it would be impracticable to bring them all before the court (*McKenzie agt. L'Amoreaux, 11 Barb., 516*). This decision has been repeatedly approved, and has stood for upwards of thirty years as a correct exposition of the practice under this section of the Code (*Kerr agt. Blodgett, 48 N. Y., 66*; *Prouty agt. Railroad Co., 1 Hun, 667*; *Towner agt. Tooley, 38 Barb., 598*). In such a suit the interlocutory judgment acts as a decree in favor of each person

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entitled to come in, whether he actually comes in or not, as effectually as if he had been named and appeared as a party (*Kerr agt. Blodgett*, 48 *N. Y.*, 62-69). He is *quasi* a party; his cause is in the course of decision and he may at any time take an active part (*Calvert on Parties*, 58; *Hubbard agt. Eames*, 22 *Barb.*, 601, 602). The Code contains express provisions for giving notice to these *quasi* parties to come in, which notice is to be in the form of a direction of the court contained in an order or judgment, and is to be published as the Code prescribes (*Code*, sec. 786). If, after due service of such notice they do not come in and contribute to the expenses of the action and take its benefits, they are barred of all further claim upon the fund in controversy and the administrators are effectually protected by the judgment (*Kerr agt. Blodgett*, 48 *N. Y.*, 62; *Hallett agt. Hallett*, 2 *Paige*, 15, 19-21; *Schuele agt. Reiman*, 86 *N. Y.*, 270, 273). The union of interest contemplated by section 448 of the Code is that of joint tenants, cotrustees, partners, joint owners or joint contractors simply (*Jones agt. Felch*, 3 *Bosw.*, 63, 66). The next of kin of a deceased person or the distributees of a trust fund are not united in interest. They simply have a common interest in the fund, but each owns his undivided share separately. In such a case one may sue for the benefit of all, under section 448 of the Code, without regard to the question of number or inconvenience (*McKenzie agt. L'Amoreaux*, 11 *Barb.*, 516; *Hallett agt. Hallett*, 2 *Paige*, 15; *Towner agt. Tooley*, 38 *Barb.*, 598; *Robins agt. McClure*, 33 *Hun*, 368, 370; *West agt. Randall*, 2 *Mason*, 180). In *Robins agt. McClure* (33 *Hun*, 368) one next of kin sues for himself and all the others to determine the ownership of a lapsed legacy. The court entertained the action and the case is now in the court of appeals on the merits. The English courts always entertained actions by one next of kin for the benefit of all where it was inconvenient or impracticable to bring them all before the court, but the rule has not been so rigorous in this country (*Story's Eq. Plead.*, secs. 89 to 91 and 105). In *Caldecott*

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agt. *Caldecott* (1 *Craig & Phillips*, 183), Lord COTTENHAM held that "in order to enable the court to adjudicate upon the right to a residue of personal estate as between the next of kin as a class and a party claiming under a will, it is not necessary that all the next of kin should be present, provided the court be satisfied that some of them are parties to the record." In *West* agt. *Randall* (2 *Mason*, 181), judge STORY, says: "It seems the better opinion, that one heir-at-law or next of kin, suing for a distributive share of an estate cannot maintain his bill in equity, without making the other heirs or next of kin parties or showing them to be without the jurisdiction or within some other exception. But the rule on this subject does not seem to be inflexible." Unless the persons are within the jurisdiction it is not necessary to make them parties (*Angell* agt. *Lawton*, 14 *Hun*, 70; *affirmed*, 76 *N. Y.*, 540). Here, as matter of fact, the next of kin are out of the jurisdiction. Mrs. Burr lives in Boston and the two Farnams in Connecticut. But it is not necessary to show that fact, unless the plaintiff sues for his share alone. Here he properly sues for the benefit of all. Under the Code of Civil Procedure the English rule is not the rule of decision. A more liberal practice prevails. Where the plaintiff is one of a class however small, who have a common interest, and institutes his suit for the benefit of all who will come in and share its burden and benefits, the action is properly brought and will be entertained. It would be very unjust to compel the plaintiff to make these other next of kin parties defendant. They could then have the benefit of the action, without sharing its expense or burden. That is no doubt the object sought by this demurrer, for one of the administrators is himself one of the next of kin. There is no defect of parties in this action. All of the next of kin are represented in the action commenced in the name of one for all. They are *quasi* parties, and can make themselves actual parties at any time by coming in and joining with the plaintiff. In due course of procedure the court will make the order or judgment provided for in section 786 of

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the Code, requiring them to come in and directing its proper service. If, after that, they elect to hold aloof, instead of coming in and sharing the burdens and taking the benefits of the action the judgment herein will be conclusive upon them and a complete protection to the administrators. The demurrer should be overruled with costs to be paid from the estate.

Simpson, Thacher & Barnum, attorneys for defendants.

William M. Barnum and *Charles N. Farnam*, as administrators.

LEWIS, J.—It is alleged in the complaint that Henry Parsons Farnam, late of the city of New York, deceased, made his last will and testament in 1873, and died December 3, 1884; that the defendants Barnum and Farnam were duly appointed administrators with the will annexed. That the testator was never married and left no descendant or ancestor surviving him, and that his only heirs-at-law and next of kin surviving him are Sarah N. Burr, his sister, and Amelia L. Farnam and Mary Farnam and Charles N. Farnam, the children of his brother Charles N. Farnam, who died in April, 1873, and that the deceased was at the time of his death the owner and in possession of a considerable personal estate, and of certain real estate in the city of New York and elsewhere. That in and by the will of the testator devisees were made in trust. That the trusts attempted to be created thereby are void, and that the whole estate of the testator, subject only to the payment of his debts in due administration, belongs to the heirs-at-law and next of kin and is their sole and absolute property, and the plaintiff claims that the administrators hold the same in trust for the next of kin and heirs-at-law of the deceased.

It further alleges that the question involved in the case is one of a common or general interest of many persons, and that the plaintiff brings the action not only on her own behalf,

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but for the benefit of all heirs-at-law and next of kin who will come in and contribute to the expenses thereof, and judgment is demanded declaring the said legacies to have lapsed in favor of the next of kin, and that the trusts attempted to be created are void and adjudging that the administrators hold all said personal estate subject to the payment of debts in due administration, and in trust for the said next of kin to be distributed according to the statute of distribution. And adjudging that the said heirs-at-law are owners in fee simple absolute of the real estate. The determination of the question raised by this demurrer depends upon the construction to be given to section 448 of the Code of Procedure, which provides that "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants. * * * And where the question is one of a common or general interest of many persons, or where the persons who might have been made parties are very numerous and it may be impracticable to bring them all before the court, one may sue or defend for the benefit of all."

If Sarah N. Burr, Amelia L. Farnam, Mary E. Farnam and Charles Newell Farnam are united in interest in the questions involved in this controversy within the meaning of said section, then they all must be made parties to the action and the demurrer must be sustained. If the question is one simply of a common or general interest to them, then the plaintiff may bring this action for the benefit of herself and others interested, and the demurrer should be overruled. This was the rule before the Code (*See Barbour on Parties*, page 331; *Brown agt. Rickerts*, 3 *Johns. Ch.*, 553; *Thompson agt. Brown*, 4 *id.*, 619; *Ross agt. Crary*, 1 *Paige*, 416; *Hallett agt. Hallett*, 2 *id.*, 15).

The plaintiff and the persons whom defendants insist should be made parties, being the heirs-at-law and next of kin of the deceased testator, if a decree be made pursuant to the prayer of the complaint, these defendants, instead of holding the personal estate for the purposes named in the will, will hold

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the same after payment of the debts of the deceased for the benefit of the next of kin, as their interests may appear. The real estate would descend to them according to the law of descent. No part thereof could be adjudged in this action to belong to any one of the persons named. If the object of the action were to obtain an adjudication that the whole or part of the estate belonged to the plaintiff or to the plaintiff and one or more, less than all of the other heirs-at-law or next of kin of the deceased, then it could be successfully maintained that all are necessary parties to the action, for they would have a joint interest in the question involved, but in this case they have only a common interest to have the bequests declared void, and such adjudication would inure to their common benefit. They have a like interest in the question as the judgment creditors of an insolvent debtor who had made a fraudulent assignment, would have in an action to set it aside and have it declared void. Such creditors would have a common or general interest to have the assignment void, but their interest would not be united within the meaning of section 448 of the Code. One creditor may sue for herself and others similarly situated, to set aside the assignment without joining them as parties to the action (*Hammond agt. Hudson River I. and M. Co.*, 20 Barb., 378; *Petrie agt. Lansing*, 66 Barb., 557).

When the question is one of a common or general interest of many persons, or when the persons who may be made parties are very numerous, it being impracticable to bring them all before the court, then one may sue for the benefit of all. The word "many" is not used in this section to express the idea of *very numerous* persons. There are two classes named where one may sue for all. One is where many persons have a common interest, and another where the parties are so numerous that it is impracticable to bring them all before the court. While the word "many" as here used contemplates more than one, it does not necessarily *very numerous persons* while the word "many" as ordinarily used

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is synonymous in meaning with "numerous" As used in this section in connection with the words "common or general interest of the persons" it means a limited number. It is the character of the interest which controls, rather than the number of persons. The third class mentioned "very numerous" one is allowed to sue for all, as a matter of convenience in the administration of justice by the court. This construction was given to this section in *McKenzie* agt. *L'Amoreaux* (11 Barb., 516). This case has been referred to with approval and has not been disturbed by any case to which my attention has been called. Under the practice that existed at the time of the adoption of the Code, this action could be maintained by the plaintiff in its present form (*Brown* agt. *Rickets*, 2 Johns. Ch., 553). Actions against administrators, as well as actions against assignees for the benefit of creditors brought to set aside an assignment, are exceptions to the rule that all parties having an equitable interest named by the decree are necessary parties thereto (*Moore* agt. *Hageman*, 6 Hun, 290). In *Jones* agt. *Fetch* (3 Bosw., 66) the court says: "On a demurrer to a complaint we apprehend that the test of the unity of interest intended by the one hundred and nineteenth (448) section, is that the joint connection with or relation to the subject matter, which by the established practice of the common-law courts will preclude a separate action."

The demurrer should be overruled with costs, with leave to defendants to answer in twenty days from the service of a copy of this order, upon the payment of the costs.

Matter of Karr.

SURROGATE'S COURT.

In the Matter of the Judicial Settlement of the Accounts of
JOEL KARR, as Executor of the Will of AMI WHITNEY,
deceased.

Will—Rules as to construction of—Who entitled to distributive shares of the estate.

Where a will provided as follows: "*First*. After all my lawful debts are paid and discharged, I give and *bequeath* to C. M., who is now living with me, his heirs and assigns, all that house, lot, tract and parcel of land where I now reside in the town of Almont, Alleghany county, N. Y., containing about forty acres of land." Immediately following this there are sixteen "items" by which the testator bequeaths to twenty-two persons specific sums of money; each clause of the bequest commences: "I give and *devise*." The eighteenth clause reads: "I give and devise all the rest, residue and remainder of my real estate and of my personal estate, goods and chattels of every kind whatsoever, if any there shall be after paying my debts and the legacies hereinafter named to the several legatees hereinbefore named, to be divided between them share and share alike." In a codicil to the will the testator slightly changed some of the bequests and at the end of which was this clause: "I have by my last will referred to above, willed that any remainder or residue of my estate real or personal which may remain after paying debts and legacies, be distributed among the several legatees share and share alike. Now, therefore, I do by this my writing, which I hereby declare to be a codicil to my said will and to be taken as a part thereof, order and declare that my will is, that such distribution be made, not share and share alike, to the *legatees*, but *pro rata* or in proportion to the several *legacies* excepting E. L. and H. B. F. who are not to share in such distribution." C. M. is the only devisee, and the real property above mentioned is the only real property devised. The testator died leaving a small parcel of land undisposed of in any way other than by such residuary clause in the will and codicil.

Held, that the devisee C. M. is not entitled to any portion of the residuary estate, and it should be distributed to the legatees named in the will, in the proportion therein named.

Strictly speaking, real estate given by will is devised, and personal estate is bequeathed. The one receiving real estate is termed a devisee, and the one taking personal property a legatee. One act of giving is a devise, the other a bequest. The person receiving a devise or a bequest is a beneficiary.

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A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he appears to have used them will be the sense in which they are to be construed.

The ordinary as well as technical meaning of the word "*legacy*" is a gift of property by will other than real estate; this is its strict and primary sense and the one generally accepted. This is the meaning that will be attached to the word by the court, unless it clearly appear from the will itself that the testator has used the word in a different sense.

Allegany county, August, 1885.

Wesley Brown, for legatees.

C. W. Stevens, for devisees.

FAENUM, S. — Is Clinton Moss, a devisee under the will of the testator, entitled to a distributive share of this estate?

The first clause of the will is as follows: "First. After all my lawful debts are paid and discharged, I give and bequeath to Clinton Moss, who is now living with me, his heirs and assigns, all that house, lot, tract and parcel of land where I now reside in the town of Almond, Allegany county, N. Y., containing about forty acres of land."

Immediately following this there are sixteen "items" in his will by which he bequeaths to twenty-two persons specific sums of money; each clause of the bequest commences: "I give and devise."

The eighteenth clause reads: "I give and devise all the rest, residue and remainder of my real estate and of my personal estate, goods and chattels of every kind whatsoever, if any there shall be after paying my debts and the legacies hereinafter named to the several legatees hereinbefore named, to be divided between them share and share alike."

Nine years thereafter the testator made a codicil to said will which was duly admitted to probate with the will, wherein he slightly changed some of the bequests, and which at the end had this clause: "I have by my last will and testament,

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referred to above, willed that any remainder or residue of my estate real or personal which may remain after paying debts and legacies, be distributed among the several legatees share and share alike. Now, therefore, I do by this my writing, which I hereby declare to be a codicil to my said will and testament and to be taken as a part thereof, order and declare that my will is, that such distribution be made, not share and share alike, to the *legatees*, but *pro rata* or in proportion to the several *legacies*, excepting Elizabeth Leonard and Hattie Belle Ferry who are not to share in such distribution."

Clinton Moss is the only devisee, and the real property above mentioned is the only real property devised. The testator died leaving a small parcel of land of little value undisposed of in any other way than by such residuary clauses in the will and codicil.

All the beneficiaries under the will other than said Moss claim that they should take the residuum of the estate and that he should be debarred from any portion of it.

The devisee contends that the testator has not used the words "*legatees*" and "*legacies*" in the sense in which they are generally understood, and points to the places in the will where he used the word "*devise*" to give personal estate and "*bequeath*" to pass real estate, and from that urges that he did not use such words in their technical sense. This argument assumes that because the testator made a misuse of two words he did not understand the meaning of a third. This is not a legitimate inference, and the devisee's contention cannot be upheld on this ground.

Strictly speaking, real estate given by will is devised and personal estate is bequeathed. The one receiving real estate is termed a devisee and the one taking personal property a legatee. One act of giving is a *devise*, the other a *bequest*. The person receiving a *devise* or a *bequest* is a beneficiary. These distinctions are rarely recognized in wills drawn by those not familiar with legal matters or those careless in the use of words and legal terms. This will presents a familiar

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illustration of it. Evidently the scrivener had in mind that there was a distinction between a bequest and a devise, but unfortunately had the true meaning of the words reversed. However, there is no difficulty or chance to misconstrue the testator's meaning in any instance until we reach the residuary clause of the will.

Whenever it becomes necessary to construe or interpret a will the fundamental principle to be kept in view is that the intention of the testator must govern, where it is not inconsistent with the rules of law. Where there is an uncertainty apparent upon the face of the will, as to the application of any of its provisions, the court is bound to discover the intention of the testator, and in so doing it must proceed upon known principles and established rules, not on loose conjectural interpretations, or by considering what a man may be imagined to do in the testator's circumstances. In other words, the question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of the words used by him. But the rule is inflexible, that guesses at the testator's intention will not be indulged in (*Redf. Surr. Pr.*, 243). "A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed" (*Wigram on Wills, Proposition I* [2 *Am. ed.*, 1872], 58). "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense and in no other, although they may be capable of some popular or secondary interpretation, and although the most

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conclusive evidence of intention to use them in such popular or secondary sense be tendered" (*Proposition II, id.*, 66). There is nothing in the context of this will making it apparent that the testator used the words "legacies" and "legatees" otherwise than according to their strict and primary acceptation or sense. What is the primary meaning of the words legacy and legatee? Webster defines legacy to be "a gift by will of personal property, a bequest," and a legatee as "one to whom a legacy is bequeathed." Worcester says a legacy is "a gift of goods and chattels by will or testament; a bequest." The American Encyclopedia defines a legacy to be "a gift of any personal property by will." Chamber's Encyclopedia says a "legacy is a bequest or gift contained in the will of a deceased person of a chattel or sum of money or other thing."

In *Orton agt. Orton* (3 *Keyes*, 486, 488) justice PARKER, writes "every bequest of personal property is a legacy." "The word devise is specially appropriate to a gift of lands and the legacy to a gift of chattels," and he there quotes from several authorities. Williams quotes from *Godolphin* (pt. 3, chap. 1 sec. 1). "A legacy is defined to be some particular thing or things given or left, either by a testator in his testament wherein an executor is appointed, to be paid or performed by his executor or by an intestate in a codicil or last will, wherein no executor is appointed to be paid or performed by an administrator" (2 *Wms. on Ears.*, [6th. *Am. ed.*], 1113, 1051). Dayton adopts the same definition (*Dayton on Surr.* [3d. *ed.*], 396). Jarman quotes the same language (1 *Jar. on Wills*, [*R. & T. ed.*], 145).

In Sheppard's Touchstone we have (vol. 1, p. 400): "A devise, or legacy, is where a man in his testament doth give anything to another; the first of these terms is properly applied to the gift of lands and the last to the gift of goods or chattels; and, therefore, a devise strictly is said to be where a man in his testament doth give his lands to another after his decease; and a legacy is said to be where a man in his testament doth give any chattel

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to another to have after the death of the testator; but the word is promiscuously applied to the one and to the other. And he that gives by such a will is called the deviser, and he to whom the thing is given, the devisee or legatee."

Blackstone says: "A legacy is a bequest or gift of goods and chattels by testament, and the person to whom it was given is styled the legatee" (2 *Bl. Com.*, 512).

McClellan writes, citing *Orton* agt. *Orton* (*supra*): "A legacy, in general terms, is a gift by will of some property other than real estate" (*Surr. Pr* [2d ed.], 539).

Roper writes. "We proceed to consider the import of the word 'legacy.' This word, though properly applicable to bequests of personal estate only, has, nevertheless, been extended to property not technically within its import, in order to effectuate the intention, so as to include real property and annuities" (2 *Roper on Legacies* [1st Am. ed., 1829], 335).

In *Bouvier's Law Dictionary* a legacy is defined as "a bequest or gift of goods or chattels by testament," and then adds: "This word, though properly applicable to bequests of personal estate only, has nevertheless been extended to property not technically within this import, in order to effectuate the intention of the testator, so as to include real property and annuities."

Pratt agt. *McGee* (17 *S. C. Rep.*, 428; *S. C.*, 3 *Am. Prob. Rep.*, 171) was a case which arose under a statute providing that "if any child should die in the lifetime of the father or mother, leaving issue, any *legacy* given in the last will of such father or mother shall go to such issue." The chief object of the testator's bounty was his son, to whom he gave his entire real estate. The son died in the lifetime of the testator, leaving a widow and children. Upon a partition the children of the deceased devisee claimed that the gift to their father was saved from lapsing by reason of the statute. This claim was denied by the court, it holding that the term "legacy" could not be construed to include a devise of real estate, but must be construed to apply only to a gift of per-

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sonalty according to its technical meaning (*see, also, Havens agt. Havens*, 1 *Sandf. Ch.*, 324 [335]).

So far as I have been able to discover, wherever it has been held that the word "legacy" carried real estate, it has been placed upon the express ground that from the language of the will it appeared evident to the court that the testator had given the word a broader interpretation than would ordinarily be allowed. This is in accordance with *Wigram's First Proposition*.

The ordinary as well as technical meaning of the word "legacy" is a gift of property by will other than real estate; this is its strict and primary sense, and the one generally accepted. This is the meaning that will be attached to the word by the court, unless it clearly appear from the will itself that the testator has used the word in a different sense.

In the judgment of the surrogate, the devisee Clinton Moss is not entitled to any portion of the residuary estate, and it will be distributed to the legatees named in the will in the proportions therein named. A decree will be entered accordingly.

SUPREME COURT.

MARY L. McKENNA, temporary administrator, &c.,
respondent, agt. THOMAS BOLGER, appellant.

Contracts — Evidence — Oral contract to convey land — Admissibility of evidence — Code of Civil Procedure, section 829.

An agreement of purchase and sale reduced to writing, &c., is not at all necessary when an action is brought to recover an agreed price for lands actually sold and conveyed pursuant to an oral agreement, when the consideration remains unpaid.

A party is not precluded from testifying to extraneous facts, which tend to show that one who has testified to such a transaction has testified falsely, or that it is improbable that his statement can be true.

It is not the intention of the Code (*sec. 829*) to prevent a party to a suit from testifying to any extrinsic fact that tends to contradict a witness

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who swears to transactions or communications had between such party and a deceased person, even where he cannot directly testify that no such conversation or transaction was ever had.

It was not the intention to prevent the contradiction of a living witness, but to prevent a living party to a transaction or communication from testifying to it himself when death has closed the mouth of the other party.

So when a living witness swears to a contract made by a defendant with a deceased party at a specified time or place, there is nothing in the Code to prevent the defendant from testifying that at the time named he was in Europe or at some distant place, rendering it impossible that the witness speaks the truth.

First Department, General Term, May, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from a judgment, entered on a verdict.

John McCrone and John T. Fenton, for appellant.

M. J. McKenna, for respondent.

DAVIS, P. J. — This action was brought to recover a sum alleged to have been agreed to be paid by the appellant to the decedent, John P. O'Neill, for his interest in a certain farm held and owned by the appellant and O'Neill as tenants in common. The substance of the alleged agreement is, that on receiving title to the whole of the farm through amicable proceedings to foreclose a mortgage then existing upon it, the appellant should pay O'Neill \$1,666, being one-half of the sum originally invested by O'Neill in the purchase of the farm. A foreclosure was had, it is claimed, under this agreement, at which the appellant purchased the farm and took title to the whole thereof, giving his individual bond and mortgage in lieu of those previously existing, but afterwards refused to pay the price stipulated for O'Neill's interest.

We see no reason why such an agreement, when consummated by the actual sale and conveyance of the whole title, is not a valid one upon which an action can be maintained

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for the price agreed upon as for lands sold and conveyed at a purchaser's request at a stipulated price. An agreement of purchase and sale reduced to writing, &c., is not at all necessary when an action is brought to recover an agreed price for lands actually sold and conveyed, pursuant to an oral agreement, where the consideration remains unpaid. And that, in substance, was the alleged agreement in this case, except that the purchaser was to take the title through an amicable foreclosure to be produced and consummated by the seller. We have already determined this question on the demurrer to the answer brought before us by appeal from the special term.

But questions as to the admissibility of evidence arose upon the trial of this case that call for consideration. This action was brought by O'Neill in his lifetime. On his decease the present plaintiff was substituted as his temporary administratrix. The chief testimony in the case to support the alleged agreement was given by one Tobias, a lawyer, who was to some extent connected with O'Neill in business and acted on his behalf in carrying out the agreement. He gave testimony tending to establish the agreement by conversations had in his office and in his presence between O'Neill and the appellant. The agreement was denied by the appellant in his answer, and for the purpose of contradicting or impairing the testimony of Tobias, the defendant sought to give testimony himself, showing a condition of things inconsistent with the alleged making of such an agreement. With this view, amongst other things he was asked the following question :

"Will you state to the jury what induced you to have the property foreclosed?" This question was objected to on the ground "that it is a personal communication with the deceased." The objection was sustained and an exception taken. The appellant was then asked: "State the situation of the property at the time before the foreclosure suit as to the payment of interest and all that?" The same objection and ruling was made and the same exception taken.

The appellant claimed that the foreclosure was not made

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because of any such agreement as the plaintiff alleged, but because of O'Neill's neglect to pay interest on the mortgages and to keep up his part of the expenses of carrying the property. These were extrinsic facts clearly competent to be proved as tending to maintain the defendant's theory of the case. We see no reason why they could not be proved by his testimony. They were not of necessity personal transactions or communications had between the defendant and the deceased, and if they turned out to be in whole or in any part of that character, they could have been to such extent excluded when the fact appeared.

In *Pinney agt. Orth* (88 N. Y., 447) it was held that "a party is not precluded from testifying to extraneous facts which tend to show that one who has testified to such a transaction has testified falsely, or that it is improbable that his statement can be true" (*See, also, Lewis agt. Merritt*, 98 N. Y., 206).

The facts and circumstances which the questions excluded were designed to call out may, perhaps, have been such as to satisfy the jury that Tobias had not testified truly as to the making of the alleged agreement, and they were not necessarily within the inhibition of section 829 of the Code, and therefore the testimony should have been received, and so far as it appeared to be outside of the inhibition of that section and suited to the consideration of the jury.

The following questions were also asked the appellant and excluded under the same objection and exception:

"State whether or not you ever made any agreement with Mr. Tobias acting for Mr. O'Neill, O'Neill being absent, in relation to the purchase of O'Neill's interest in such farm?"

"How many times were you in O'Neill's office in relation to this transaction?"

The ruling as to these questions was erroneous. Tobias had given testimony tending to show that he had conversations with appellant on the subject of the alleged agreement when O'Neill was not present, and in relation to the payment of the

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amount sued for. The defendant was not precluded from contradicting that testimony or from showing affirmatively how often he had been at O'Neill's office, and whether or not there had been any agreement made between himself and Tobias in the absence of O'Neill.

In *Pinney agt. Orth (ubi sup.)* the court said: "We think that Mr. Orth, the defendant, was competent to testify that he was not in the city of New York at the time referred to by the witness, or that the witness was at some other place, or that he never met the witness at the office when the conversations are alleged to have occurred." It is not the intention of the Code to prevent a party to a suit from testifying to any extrinsic fact that tends to contradict a witness who swears to transactions or communications had between such party and a deceased person even where he cannot directly testify that no such conversation or transaction was ever had. It was not the intention to prevent the contradiction of a living witness, but to prevent a living party to a transaction or communication from testifying to it himself where death has closed the mouth of the other party. So when a living witness swears to a contract made by a defendant with a deceased party at a specified time or place, there is in our judgment nothing in the Code to prevent the defendant from testifying that at the time named he was in Europe or at some distant place, rendering it impossible that the witness speaks the truth.

Subsequently to the foreclosure and purchase by the defendant of the farm, it was shown that one McCandless commenced a suit against the defendant and O'Neill, alleging that he was in equity an owner of one-third of the farm, and that the proceedings in the foreclosure suit and in the sale to the defendant were fraudulently had and taken to deprive him of his interest in the property. This suit was an amicable one as between McCandless and O'Neill, it being arranged that no judgment should be taken against O'Neill, but he should be made a formal party, because the title of the farm had been, prior to the foreclosure, in him and the defendant. It was

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testified that O'Neill furnished all the facts stated in the complaint to the attorney of McCandless, who verified the complaint (McCandless being a non-resident) upon the statements of O'Neill. The attorney testified in substance that the statements of the complaint were those made to him by O'Neill, who, though a defendant, instigated the suit. The complaint was then offered and rejected and exception taken.

We think the complaint was competent as declarations of O'Neill. The declarations, it is claimed, tended to contradict the allegations of O'Neill's complaint in this action as to the reasons for having the foreclosure and sale of the farm. The complaint offered in evidence is not before us, and we cannot see how far it would have gone toward that object, but it was not excluded because it did not tend to such contradiction, and we think it was error to exclude it.

For these errors, without considering the other points presented by the appellant, we are of opinion that the judgment must be reversed and a new trial ordered, with costs to abide the event.

BRADY and DANIELS, JJ., concurred.

SUPREME COURT.

SAMUEL A. FOSTER agt. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Railroads — Negligence — Questions of fact for jury — Contributory negligence — When injured party guilty of.

Plaintiff arriving at the passenger depot of the defendants' railroad, which has two modes of ingress and egress — one by Steuben street, which is on a level with the depot, the other by Maiden lane, which has a stone stairway maintained and kept by the defendant — took the stone stairway to Maiden lane and while passing such stairway slipped and fell injuring himself, for which injury he brought an action against the railroad. At close of plaintiff's case, and also when the testimony was complete, defendant moved to nonsuit plaintiff on the grounds that

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negligence of defendants in removing snow and ice from the steps had not been shown, and that the absence of contributory negligence by plaintiff did not affirmatively appear, but, on the contrary, the undisputed evidence showed that he was guilty of contributory negligence. The motion was denied and both questions were submitted to the jury as questions of fact to be determined by them upon a motion for a new trial.

Held, first. That while the defendant showed by its employes that it had been diligent in removing all snow and ice, yet on the other hand, there was evidence on the part of the plaintiff that the snow and ice had been upon the steps for several days. What was the truth in that particular was a question of fact; and whether or not, if the jury believed the witnesses of the plaintiff rather than those of the defendant, the defendant has been guilty of negligence in failing to remove such snow and ice was also a question of fact. These were proper questions to be submitted to the jury.

Second. When a person who is walking on a dangerous and slippery place, persists in doing so without using, as he might readily and easily do, the safeguards there placed for his protection and support; (i. e.) when, as in this case, the person injured knew he was walking upon slippery steps upon which he was liable to fall, and knowing that he could protect himself by grasping a rail placed there for that purpose, yet proceeds with full knowledge of his peril and of his neglect of a means of safety; these conceded facts demonstrate that the person injured was clearly guilty of contributory negligence and should have been nonsuited.

Albany Circuit, January, 1885.

MOTION for new trial on the minutes of the court.

Parker & Countryman, for plaintiff.

Hamilton Harris, for defendants.

WESTBROOK, J. — The plaintiff had a verdict in this action for \$1,000, which the defendant moves on the judge's minutes to set aside.

The trial disclosed the following facts: The plaintiff was a resident of the city of Albany, and on the 24th day of February, 1881, he went to the city of New York to purchase goods for his employers, W. M. Whitney & Co. of Albany. He returned during the evening of the following day by the

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railroad of the defendant on the train leaving New York at six o'clock P. M. On his arrival at the city of Albany he did not leave the depot grounds by Steuben street, which is on a level with the depot, but on coming out of its front entrance on the westerly side he went southerly along the depot building and then down several steps to Maiden lane. The depot and grounds though on a level with Steuben street are considerably higher than Maiden lane. A stone stairway, maintained and kept by the defendant, is the mode of ingress and egress to or from Maiden lane, from or to the depot grounds of the defendant in the city of Albany. The plaintiff when he went to New York did so by the road of the defendant, entering the depot by Steuben street. When he returned, however, as already stated, he left the grounds by the stone stairway to Maiden lane. His claim was that the stairs were icy and dangerous and had been so for a considerable period of time, and that while descending the stairs, using all due care, he slipped and fell, breaking the bones of the two middle fingers of his right hand.

At the close of the plaintiff's case and also when the testimony was complete, the defendant moved to nonsuit the plaintiff on the grounds that negligence by the defendant in removing snow and ice from the steps had not been shown; and that the absence of contributory negligence by the plaintiff did not affirmatively appear, but, on the contrary, the undisputed evidence showed that he was guilty of contributory negligence. The motion was denied and both questions were submitted to the jury as issues of fact to be determined by them. To the refusal to nonsuit and to the submission of the questions to the jury there were proper exceptions taken by the defendants, upon which, and upon the further ground that the verdict is against evidence, a motion is made for a new trial.

Upon the first point, the failure to prove negligence by the defendant in removing the ice and snow from the stairs, there was, as it seems to me, no error committed. While the defendant showed by its employees that it had been diligent in

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removing all snow and ice, yet on the other hand there was evidence on the part of the plaintiff that the snow and ice had been upon the steps several days. What was the truth in that particular was a question of fact, and whether or not, if the jury believed the witnesses of the plaintiff rather than those of the defendant, the defendant had been guilty of negligence in failing to remove such snow and ice, was also a question of fact. Upon the other, however, the contributory negligence of the plaintiff, there is very serious difficulty. There was a rail on both sides of the stairway, placed there for the protection of the persons using it. The plaintiff discovered the condition of the stairs when he reached the second step, because he slipped there, and as he testified, "came very near falling." Though thus warned of his danger he did not avail himself of the protection afforded by the rail on either side. On the contrary, he admitted upon the witness stand, that while he knew there was a rail on one side, at least, he continued on his way without resorting to its help, which unoccupied hands and arms enabled him to utilize, until he got half way down stairs, when he fell and sustained the injury before mentioned. Other persons following the plaintiff and others preceding him, went down in safety. Mr. Arthur J. Stone, one of his witnesses, who arrived at the foot of the steps just as the plaintiff fell, testified that he went down the stairs in safety, because, as he said, "he had hold of the rail and so experienced no difficulty." The question, therefore, which is presented is this: When a person who is walking on a dangerous and slippery place, persists in doing so without using, as he might readily and easily do, the safeguards there placed for his protection and support, is he or is he not, if he falls and is injured, guilty of contributory negligence? It will not be denied that a case can be conceived when the failure to use a safeguard against injury might not be negligence, or in which, at least, it might be a serious question of fact. But when the facts are, as in this case, undisputed, when the person injured knew he was walking upon slippery steps upon

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which he was liable to fall, and knowing that he could protect himself by grasping a rail placed there for that purpose, yet proceeds with full knowledge of his peril and of his neglect of a means of safety, can there then be a question for the jury, and do not the conceded facts demonstrate that the person injured was clearly guilty of contributory negligence? If a person on a sinking steamer, with full consciousness of his peril and so cool and collected as to know of the presence of a life preserver, should refuse the use of such preserver and drown, or if in the water, with his senses not disturbed by fright, he should deliberately refuse a proffered rope which he could easily seize and be rescued, there would in neither case be room to doubt the presence of contributory negligence. And so in this case, a man who has not lost his senses by fright, sees his peril, refuses a proffered support at hand, goes on over a dangerous road and is injured. Can there be a question as to the contributory negligence?

In *Durkin agt. The City of Troy* (61 Barb., 437) the plaintiff, in walking on an icy place on a sidewalk in the city of Troy when he could have avoided it, fell and was injured. The court held that as plaintiff saw the ice, and was also warned of it at the time, "he was not in a situation to charge his injury to the default of the city, if the city was in default, and should therefore have been nonsuited."

In *City of Erie agt. Magill* (101 Penn., 616) the plaintiff, who fell in crossing a dangerous ridge of ice upon the sidewalk, claimed to recover for the injury sustained by the fall because of "the negligence of the defendant in permitting a dangerous ridge of ice to accumulate and remain for an unreasonable time on the sidewalk where she fell while lawfully walking thereon." The defendant "claimed that it appeared by the plaintiff's own testimony that the plaintiff was guilty of contributory negligence in attempting to cross the ridge of ice, having full knowledge of its dangerous condition, when she could easily have avoided it by walking around where there was a safe passage." The trial court refused to nonsuit,

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but submitted as a question of fact to the jury whether or not the plaintiff was guilty of contributory negligence. The jury found for the plaintiff. The supreme court of Pennsylvania granted a new trial, holding that it was not a question of fact for the jury and that the plaintiff should have been nonsuited. Justice GREEN, in delivering the opinion of the court, quotes approvingly from the case of *Durkin agt. Troy* and concludes thus: "In *Butterfield agt. Forrester* (11 East, 60) lord ELLENBOROUGH, U. J., said: 'A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right.' These principles are quite familiar and could be sustained, if necessary, by an extensive citation of authorities, but that is not requisite."

It is not seen why the principle which controlled the cases cited is not applicable to the present. Indeed, it would seem that the facts are stronger against the plaintiff in this case than they were against the plaintiff in either of the others. Whether or not a certain piece of ice is so dangerous that it is carelessness not to avoid it might possibly, in the absence of a demonstration that it was dangerous by an attempt to pass it, be questioned. But of the danger which the plaintiff incurred in passing down those steps he had warning in the slip and almost a fall on the second step, he not only saw but felt the peril, and he yet proceeds refusing the help of the rail. If a person, who was to his knowledge protected in some way from slipping, had stepped to his side upon the first slip and proffered aid in the descent and he had refused it would he not have been negligent? Wherein does his conduct differ from that of the supposed case? The aid was proffered, the presence of the rail was the offer of help, and was refused. His friend not so reckless accepts and proceeds in safety, but he declines and is injured. Is not the proof of negligence complete?

How this case upon a cool review impresses me has now been

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frankly stated. It is clear to my judgment that as matter of law the plaintiff should be held guilty of contributory negligence. The jury, however, to whom the facts were sent to obtain their judgment upon the question of negligence, have by their verdict said there was no contributory negligence by the plaintiff. Their error, however, and that of the trial court in submitting the issue to them, if any was committed, ought to be corrected by an appeal by the defendant, and the plaintiff should not be subjected to the expense of maintaining his verdict by an appeal from an order setting it aside. The plaintiff should not in my judgment be deprived of the benefit of his verdict unless the court of last resort decides that there was no question of fact to be passed upon by the jury. If that court should eventually hold that the question was one of fact, then the plaintiff would be wronged by the granting of a new trial. The maintainance of the present verdict until it reaches the court of last resort, where the case ought to and doubtless will eventually go, will enable that tribunal to settle the questions involved without the cost of a second trial. If the general term, however, thinks otherwise it can grant a new trial. It seems to me though, that the denial of the present motion places the cause in the best position to review at the least possible expense to both parties the questions discussed. With this object in view the direct presentation of the questions to the court of appeals, but with a clear conviction what that decision should be, the motion for a new trial is denied.

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SUPREME COURT.

THE PEOPLE *ex rel.* JACOB HOLLER agt. THE BOARD OF
CONTRACT AND APPORTIONMENT OF THE CITY OF ALBANY.

Municipal law — Street improvements — Contracts for — When mandamus will issue to compel execution of a contract — Laws of 1885, chapter 252 — When governor of state may sign petition — Lot owners may petition by attorney.

When a law for repaving a street has been duly passed, proposals to do the work invited, bids received, and by resolution of the contracting board of a city the contract let to the lowest bidder, the proposer has a right to have the proper contract written out in accordance with his bid so accepted, and the board has no right to rescind the resolution awarding the contract. A *mandamus* will issue to compel the execution of the proper contract by the city.

Lot owners may petition a common council for a street improvement by attorney, and this, although the phrase "or their duly authorized attorneys," is omitted in the section under which petition is made, although the phrase is to be found in the preceding section. The want of power of the attorney to sign is not presumed, but must be proved by those who attack the petition.

Under chapter 252 of the Laws of 1885, the governor of the state may sign any petition required by law to be made for the improvement of streets in cities whenever the land owned by the state fronts on the street to be improved. It is immaterial that the state does not appear on the tax-rolls of the city.

The legislature has power to make the certificate of the city surveyor and engineer of a city conclusive evidence that the required number of feet are duly represented on a petition for a street improvement.

Albany Special Term, August, 1885.

MOTION for a *mandamus*.

L. G. Hun, for plaintiff.

S. W. Rosendale, corporation counsel, for defendants.

PECKHAM, J. — The parties to this controversy waive all technical objections to the hearing of the matter, and mutually desire a decision upon the merits of the case, which will

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involve a judicial construction of the meaning of some portions of the city charter, and of the act (*chap. 252 of the Laws of 1885*) entitled "An act relating to improvements in streets fronting real estate, the title to which is vested in the people of the state or any department of the state government."

The facts of the case are substantially stated in the affidavit of Mr. Holler, the relator, and it is upon such statement that the court bases its decision herein, not regarding any statement of a mere conclusion of law, however.

The counsel for the defendants interposes several objections to the granting of the writ, which will be noticed as follows:

First. The defendants claim a right to rescind the resolution amending the contract to the relator. The common council passed the law for the repaving of the street in question, and directed the defendants to carry the same out by advertising in the manner provided for by the charter, which also provides that the contract shall be let to the lowest bidder.

The common council is the body which originates the proceeding (after a proper petition has been presented to it), by passing a law or ordinance for the repaving of the street. This power is specially given to that body (*Charter*,* *p. 47, sec. 25*). The defendants, when such a law has been passed, are clothed with the power of carrying out the same, and by the statute are directed to issue proposals for the contract, which, as I have already said, they must let to the lowest bidder (*charter*,† *pp. 87, 88, secs. 3, 4, 5*); when a law for repaving has been passed and proposals issued, bids received, and, by resolution of the board, the contract let to the lowest bidder, he then has a right to go on and have the proper written contract made out in accordance with his bid so accepted, and the board has no right to rescind the resolu-

* Chap. 298, Laws of 1883; 1 S. L., p. 359, sec. 25.

† Chap. 298, Laws of 1883; 1 S. L., p. 383, sec. 5.

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tion awarding the contract, provided the law has been fulfilled and its terms complied with. If, therefore, the other objections raised by defendants are not tenable, the relator has a vested right to the contract, and the defendants cannot deprive him of it by assuming to rescind the resolution which awarded it to him, he being the lowest bidder.

Second. It is also objected that the certificate of the engineer is not sufficient, in that it speaks of the petitioners or their attorneys having signed to the requisite amount, and that the statute does not provide for a signature by attorney.

There is nothing in the objection. It is one of the most familiar maxims of the law, that what a man does by his agent he does himself. It is true that section 30 of the charter,* at page 49, speaks of the petition being signed by one or more persons, and leaves out the phrase "or their duly authorized attorneys," which phrase is to be found in the section immediately preceding. But the omission is wholly immaterial. The signature of the attorney (being authorized) is as valid as though made by the owner himself, and it would require affirmative words in the statute taking away the power to sign by attorney before said signing would be illegal. If the people signing as attorneys were not in fact authorized to sign, such want of power is not to be presumed, but must be proved by those who attack the petition as invalid. The general railroad act provides for the articles of association being signed by twenty-five or more persons. Yet it has been held that signatures of attorneys are valid (if duly authorized), and there is no presumption of a want of such authority, but, on the contrary, those who attack the signatures as illegal must show that they were unauthorized (*In re N. Y., L. and W. R. R. Co., to acquire lands*, 21 *Week. Dig.*, 437, *Ct. of App.*). But in this special case it is stated, and I believe uncontradicted, that there is enough land represented on the petition without counting the signatures by attorney, provided the land owned by the state, and which is signed for by the

* Chap. 298, Laws of 1883; 1 S. L., p. 301, sec. 30.

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governor, should be counted, and as there is not enough in any event if the state land be excluded from the count, the point is of not much practical importance.

Third. It is claimed that the signature of the governor, for the land owned by the state, and fronting on the street, is not to be taken or counted, because the land owned by the state does not legally appear upon the tax-roll, and it is further contended that there must be a petition signed by the owners of a certain proportion of the land appearing upon such, and that if the land owned by the state be not counted, the petition has not enough signers upon it. The last statement of fact is conceded, while the validity of the rest of the claim is denied. It is a fact of which the courts will take notice that many charters of municipal corporations in this state provide for a petition to the common council, board of trustees, or other governing body for any improvements of streets, which petition must be signed by some proportion of owners of the property fronting the streets before any action looking to such improvement can be taken. The state owns lands in many of our cities and villages, and is continually acquiring more for arsenal and other purposes, and the want of power in some one to represent this ownership of the state would make and has naturally made itself felt, particularly since the state is assessed for improvements of such a nature like any other owner, unless specially exempted therefrom (*Hassan agt. City of Rochester*, 67 N. Y., 528).

Under such circumstances the legislature passed the act (*chap. 252 of 1885*) already referred to. It provides that the governor may sign any petition required by law to be made for the improvement of any street by, among other things, repairing, etc., whenever the land owned by the state fronts on such street. But it is said the land of the state does not appear on the tax roll, and it is only of land appearing on such roll that the owners of a certain proportion of the same can bind the rest of the expenses of the improvement. The answer is, if such were the law, it is now, in effect, amended, for it now

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permits the governor to sign any petition required by law, and if the law in Albany has heretofore required a petition to be signed by a certain proportion of owners of land appearing on the tax rolls, the law now says that such a petition may be signed by the governor, provided the land owned by the state fronts on the street to be improved, and it may be signed by him, it of course means that the signature is to count for the number of feet owned by the state fronting on the street.

The object of the act is plain, and that is to permit the governor to sign any petition for the improvement of a street on account of the ownership by the state of any land fronting on the street, in the same manner and with the like effect as if the land were owned by a private individual, and to that extent the law is to be regarded as in effect an amendment to every charter in the state, where, without such act, the governor could not sign in behalf of the state. It might, with the same force, be claimed that the signature of the mayor, under section 31 of the charter * (page 49), for the land owned by the city cannot be counted, because the land does not appear on the tax rolls. In such case the legislature has made another and special provision, so that for land owned by the city the mayor can sign, although the land does not appear on the tax rolls, and for lands owned by the state the governor can sign, and such land must in both cases be counted. I have no doubt the act of 1885 applies to the city of Albany to the same extent as if the statute contained the words, "This act shall apply to the city of Albany."

Fourth. But even if the statute did not apply, the certificate of the city engineer that there had been secured the requisite number of feet, is made by the charter conclusive evidence. This the legislature had undoubted power to do. There is no allegation of fraud on the part of the officer making such certificate, and in the absence of all fraud, the certificate must govern, the legislature had power to provide

* Chap. 298, Laws of 1888; 1 S. L., p. 361, sec. 32.

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for a repaving by the direction of the common council, whenever in its judgment, it might be expedient, without providing for the necessity of a petition, or setting up any condition other than the unlimited discretion of the common council. Instead of permitting the common council to exercise any such power, it provides in the charter in question that it shall be exercised only upon a petition, &c., of owners, and that a requisite number of owners have signed is to be proved by the certificate of the engineer, and such certificate is by the very terms of the statute conclusive evidence of the fact, in the absence of fraud at any rate. I hold the terms of the statute under such certificate conclusive, and that the law is a valid and constitutional exercise of legislative power.

This covers the points made by defendants. None of them are tenable, and the *mandamus* should issue; but as the defendants are public officers acting in good faith, no costs are awarded against them.

SUPREME COURT.

WARD agt. COMEGYS *et al.*

Defense—Counter-claim—Answer—Reply—Distinction between defense and counter-claim—When reply to answer not allowed.

As a distinction exists between a defense and a counter-claim, when the defense is intended as a counter-claim it should be explicitly stated in the answer, so as to advise the opposite party, and in the absence of such an allegation, especially when the party defines and characterizes his answer as a defense, and it is uncertain whether a counter-claim is intended, such party is not in a position to insist that he has actually set up a counter-claim, and the answer should be construed and considered a defense.

A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff if the plaintiff had not sued the defendant.

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A plaintiff is not entitled to serve a reply set up in the answer where it is apparent that the whole object and scope of the defense to which it is sought to reply is to show that some party other than the plaintiff should have brought the action. The remedy, in such case, would seem to be a motion to strike out.

Special Term, October, 1885.

LAWRENCE, J. — This is a motion by the defendant Riggs to strike out a reply served by the plaintiff to his answer, on the ground that the defenses in the answer to which the reply is interposed do not constitute a counter-claim, and that the court has not directed a reply to be served. In the answer, none of the matters which are set up as defenses are characterized as counter-claims, but in each and every instance it is alleged that such matters are pleaded as a separate and distinct defense. In the case of the *Equitable Life Assurance Society agt. Cuyler* (75 N. Y., 511), the courts say: "The answer purports to set up a defense merely and so expressly states, and it is not claimed therein that it was such counter-claim. Had the answer advised the plaintiff that a counter-claim was intended to be set up, a reply would no doubt have been served, or at least the plaintiff would have been informed of the nature of the pleading. We think that no reply was required, for the reason that no counter-claim was actually interposed by the answer. As a distinction exists between a defense and a counter-claim, when the defense is intended as a counter-claim it should be explicitly stated in the answer, so as to advise the opposite party, and in the absence of such an allegation, especially when the party defines and characterizes his answer as a defense, and it is uncertain whether a counter-claim is intended, such party is not in a position to insist that he has actually set up a counter-claim, and the answer should be construed and considered as a defense. The defendant is bound by his own definition of the answer and cannot, at his own volition, change the nature of the pleading which he has characterized, and by so doing may have misled the plaintiff" (*Citing Bates agt. Rosekrans*,

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4 Abb. [N. S.], 276; 37 N. Y., 409; Wright agt. *Delafield*, 25 *id.*, —; Burke agt. *Thorne*, 44 Barb., 363). Tested by the principles enunciated by the court of appeals in that case, it is quite apparent that the defendant in this action could not, at the trial, claim that any of the matters set forth in his answer constitutes a counter-claim, inasmuch as he has characterized them as distinct defenses. Besides, it will be observed that the defendant, in his answer, asks for no affirmative relief. But, independently of the fact that the defendant is, by his characterization of the answer, estopped from claiming that it contains a counter-claim, it is obvious to my mind that the matter to which the plaintiff has replied does not constitute a counter-claim. In *Vassear agt. Livingston* (3 Kern., 249, 252), it was held that a counter-claim which requires a reply to put it in issue must contain in substance a cause of action in favor of the defendant against the plaintiff. The court say, at page 252: "A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff if the plaintiff had not sued the defendant." If we turn to the second defense in the answer it will be found that, while the defendant alleges that in case of unnecessary delay on the part of the plaintiff to complete the work, or failure to complete it by the time specified in the contract, the defendants were to take charge of the work and charge the increased cost or damage to the plaintiff, to be taken out of any money already earned, or to be received by the plaintiff, and that both of the contingencies having occurred, the work was thrown upon the hands of the defendants, and that thereupon the plaintiff being unable to continue the work, on or about September 1, 1883 (long after the day he was, by the contract, to complete the work), assigned all his rights, whatever they were, to John W. Rutherford, whereby whatever claim, if any, the plaintiff possessed under said contract, was assigned to said Rutherford and is vested in the hands of the said assignee, the defendant Riggs nowhere claims that he has been obliged to

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expend money in excess of the amount which had become due to the plaintiff. Indeed, it is quite apparent that the whole object and scope of the second defense to which it is sought to reply, is to show that Rutherford, and not the plaintiff, is the party who should have brought this action. I am therefore of the opinion that the plaintiff was not entitled to serve a reply in this case. The remedy seems to be a motion to strike it out (*See Develin agt. Bevins*, 22 *How. Pr.*, 290; *Dillon agt. Sixth Avenue R. R. Co.*, 46 *Supr. Ct.*, p. 21).

Motion granted, with ten dollars costs.

COUNTY COURT.

In the Matter of the General Assignment of JOHN F. SMYTH.

Assignment — What passes by general assignment — Stock exchange — Pledgor and pledgee — When relation exists between stock-broker and customer — Trust funds do not pass to an assignee — Rules for tracing them.

Stock purchased on margin by a stock-broker for a customer, becomes the property of the customer, as between them the relation of pledgor and pledgee is created and exists, and upon payment of the amount due the customer becomes entitled to the possession of the stock.

Nothing passes by a general assignment except the interest of the assignor, and if any of the assigned property is freighted with equities the assignee must recognize the same.

Trust funds do not pass to an assignee of an insolvent, and they may be followed into the hands of such assignee for the benefit of the *cestui que trust*.

Funds wrongfully appropriated may be followed into any property the wrong-doer may have invested them.

Rules stated for tracing trust funds.

If the fund in the hands of an assignee of an insolvent has been increased by reason of an appropriation by other parties having a lien upon both, of one of two classes of securities, the assignee is liable to the claimant whose property was appropriated to the extent of the increase. General creditors cannot get on an equality with those having superior claims through any action of a prior lienee.

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Under the rules of the New York Stock Exchange, when a member assigns, all securities held by other members of the exchange for indebtedness to them of the member failing, may be sold at once and without notice, and all members have a lien upon the seat in said exchange of any member indebted to them for the amount of the indebtedness.

S., of Albany, N. Y., a stock-broker and a member of the New York Stock Exchange, assigned. His New York correspondents were H. B. & Co. He bought all stock and bonds for his customers through them. They held bonds belonging to the customers of S., and also stock bought on margin. H. B. & Co., knew no one in their transactions but S. H. B. & Co., immediately after the failure of S., sold the stock and bonds of the customers of S. and applied the proceeds on their claim against S., and the assignee afterwards selling the seat, paid H. B. & Co., the balance due them, retaining the remainder thereof.

Held, that the owners of the stock and bonds so sold, had a claim superior to the general creditors of S., and were entitled to have their several interests allowed out of the moneys in the hands of the assignee, arising from the sale of the seat in said exchange.

Albany, September, 1885.

THE facts are sufficiently stated in the opinion.

Hamilton Harris, William P. Rudd, W. C. McHarg, Mead & Hatt, Hungerford & Hoteling, for claimants.

D. C. Herrick, for assignee.

NORT, C. J. — On the final accounting herein, a controversy has arisen as to the rights of certain claimants to the avails of certain negotiable bonds and stock that were in the hands of the assignor, before the assignment, and sold afterwards; all the parties in interest have signed a full statement of the facts, submitting their rights to the determination of the court.

John F. Smyth, on the 9th day of May, 1884, executed a general assignment for the benefit of his creditors, to John C. Connor. He was engaged, at that time, in business in Albany, as a stock-broker, being a member and having a seat in the New York Stock Exchange. By the rules of the exchange, when a member assigns, all securities held by other members of said exchange for indebtedness to them of the member fail-

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ing, may be sold at once and without notice, and all members have a lien upon the seat or membership in said exchange of any member indebted to them, for the amount of such indebtedness. Smyth's New York correspondents were Hotchkiss, Burnham & Co., stock-brokers, who were members of said exchange. Hotchkiss, Burnham & Co., were to purchase, pay for and carry for said Smyth and sell on his order, such stock as Smyth directed, he to keep on deposit with them, a margin in cash or securities of ten per cent, of the par value of the stock purchased. The accounts between Hotchkiss, Burnham & Co. and Smyth, charged him with the amount paid by them for stock, and credited him with proceeds of sales and margins paid in cash or securities deposited. Hotchkiss, Burnham & Co. knew no party in any transaction except Smyth. The certificate or scrip of stock remained with Hotchkiss, Burnham & Co., and if any dividend was declared thereon, the same was received by Hotchkiss, Burnham & Co., and credited to Smyth in his account, and he in turn credited his customers. If any of Smyth's customers desired the scrip, he was entitled to it on payment of its full price.

When Smyth's assignment was announced, Hotchkiss, Burnham & Co. sold all the stock and securities held by them on Smyth's account, and after crediting them with the avails thereof, he still owed them \$14,148.32. Subsequently, Smyth's assignee sold Smyth's seat in the stock exchange, for the sum of \$23,500. Out of this sum, Hotchkiss, Burnham & Co. were paid the balance due them, the residue was retained by the assignee. Does this residue go to the creditors, or is it impressed with superior claims of others? To determine this a statement of the position of the claimants must be made.

George W. Knowlton bought stock of Smyth, at various times, but closed his account, paying on March 7, 1884, a balance due Smyth of \$565.33. Instead of depositing with Smyth the usual margin, Knowlton left with Smyth a negotiable bond, par value, of \$1,000. Smyth sent this bond, without notice to Knowlton, to Hotchkiss, Burnham & Co., and he

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was credited with this amount by them. Shortly after, March seventh, Knowlton requested Smyth to sell the bond at a price not less than 115 $\frac{1}{4}$; after Smyth's assignment, Knowlton had an interview with the assignee and asked where said bond could be found. Being told where it was, Knowlton demanded its return to him from Hotchkiss, Burnham & Co., who, however, sold it for \$1,100, giving credit to Smyth for the amount thereof.

William P. Rudd had dealings with Smyth, and in a stock transaction, Rudd became entitled to give scrip negotiable bonds, which were held by Smyth for sale, as Rudd might direct. These bonds were delivered by Smyth to Hotchkiss, Burnham & Co., who sold them after the assignment, crediting the avails thereof to Smyth's account with them.

William C. McHarg, John G. Campbell, Joseph D. Craig, John C. Connor and James Middleton, had severally dealt with Smyth, buying stocks on margin, and claim that their stock having been sold after the assignment by Hotchkiss, Burnham & Co., they each have a claim for the amount that should have come to them out of the transaction if Smyth had continued in business and fulfilling his business engagements.

From the foregoing statement, it appears that Hotchkiss, Burnham & Co. had a lien upon and the right of sale of two distinct classes of securities; one of which belonged to Smyth himself, his seat in the exchange, the other was the securities held for margin, among which were those above stated. They sold the latter, thus freeing to a considerable extent, their lien upon the seat in the exchange.

The bonds of Knowlton and Rudd continued to be their property, Smyth was a mere bailee for hire; he had no charge against them or lien of any kind at the time of his failure, and if the bonds were in the actual custody of the assignee, trover or replevin would lie therefor. And so as to the stock of McHarg and others, the title to which passed to them as against Smyth, and the relation of pledgor and pledgee was created and existed (*Markham agt. Jauldon*, 41 N. Y., 236,

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Bates agt. *Drake*, 53 *N. Y.*, 211), and upon payment of the amount due beyond the margin, the pledgor would be entitled to the possession of the stock (*Wheeler* agt. *Newbould*, 16 *N. Y.*, 398; *Wilson* agt. *Little*, 2 *N. Y.*, 443). This would have been the legal position of the several parties, had not the property been hypothecated to Hotchkiss, Burnham, & Co. Do the sales therefor made by Hotchkiss, Burnham, & Co., extinguish the rights of these parties, or can they now be accorded any better position than the general creditors? It would be very unreasonable to hold that the sales did extinguish those rights, and to deny to these claimants any relief. Nothing passed by the assignment, except the property of the assignor, and if any property was freighted with equities the assignee should recognize the same (*Dos Passos on Stock Brokers and Stock Exchanges*, 162, 163).

In *Haggerty* agt. *Duane* (1 *Paige Ch.*, 231), an assignee for benefit of creditors sold property, title to which was contracted for, but had not passed and remained in the assignor's vendor. Chancellor WALWORTH directed the money arising from that sale to be paid into court by the assignee until the question of title was settled. In *Kip* agt. *Bank of New York* (10 *Johns.*, 63), it was held that under the assignment of an insolvent, no other estate vests in the assignee than that of which the insolvent had the legal or equitable title, and that property held in trust by the assignor did not pass, and if sold by the assignee, the proceeds might be traced for the benefit of the *cestui que trust*. The difficulty of tracing the fund suggested by the court in that case is admirably explained in the rules given in the note to *Hooley* agt. *Gieve* (9 *Abb. N. C.*, 41), as follows: "1. Where trust moneys have lost their individuality, by being commingled with other moneys or turned into other property, equity may establish a charge on the entire fund in favor of the *cestui que trust* to the extent to which that can be done without injustice to those having other equities in the fund. 2. In doing this, it may trace the moneys by all the means that book-keeping and an equitable

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application of payments afford, so as to fasten on the resulting fund a charge or lien for the amount divested so far as the fund can justly be subjected to the trust, but no further" (p. 41). If the bonds and stock had been sold by Smyth prior to the assignment and the proceeds mingled with his other funds, the case of *Illinois Trust and Savings Bank agt. First National Bank* (15 *Federal Rep.*, 858), would apply. The general rule that funds wrongfully appropriated may be followed into other hands and reach the property into which it has been invested is well established (*Pleasant Valley agt. Calvin*, 13 *N. W. Rep.*, 80; *Bank agt. Simonton*, 14 *Rep.*, 315; *Southpark Comm. agt. Kerr*, 13 *Federal Rep.*, 502; *Ferris agt. Van Vechten*, 73 *N. Y.*, 113).

The rights and interests of Hotchkiss, Burnham & Co. could have been fully protected by the sale of the seat in the exchange, and it cannot be that the rights of the claimants here can depend upon the notion of the New York brokers in choosing to sell their negotiable collaterals rather than the property which was impressed with no equity, but was common to all the creditors of the assignor. The law will not permit Hotchkiss, Burnham & Co. to act as an arbiter and make such an appropriation of securities as suit them (*Waller agt. Lacy*, 1 *Man. & Gr.*, 54).

It is true that the proceeds of the bonds and stocks in question never came into the hands of the assignee, as they had been used to extinguish a debt of the assignor, which was secured as well by a property to which the general creditors of the insolvent had an unquestioned right. It is indisputable, therefore, that the funds in the hands of the assignee have been increased at the expense of the claimants, and, under those circumstances, I think the rights of the claimants are impressed upon the funds so received by the assignee (*Alston agt. Holland*, 4 *Chy. App. Cases*, 168; *Taylor agt. Plumer*, 3 *Maule & Selwyn*, 562; *Broadbent agt. Barlow*, 3 *De Gex, Fisher & Jones*, 570). And we have the high authority of lord ELLENBOROUGH, who says: "And, indeed, upon a view of the authorities, it should

Matter of Smyth.

seem that if the property in the original state and form was covered with a trust in favor of the principal, no change of that state or form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim, in respect to it, than they respectively had before such change. The difficulty of tracing property, which arises in such a case, is a difficulty of fact and not of law."

Under the heading of "marshaling of securities," Mr. justice STORY says: "The general principle is that if one party has a lien on or interest in two funds, for a debt, and another party has a lien on or interest in one only of the funds, for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties wherever it will trench upon the rights, or operate to the prejudice of the party entitled to the double fund" (1 *Story's Eq. Jur.* [12th ed.], sec. 633).

It seems to be clear from the authorities (many of which I have examined, but not cited), that Knowlton and Rudd, also McHarg, Campbell, Craig, Connor and Middleton have rights and interest superior to the general creditors; they did not, as did the general creditors, repose upon the personal responsibility of the assignor, but depended upon the property in his hands, or in the hands of his brokers. To the extent of such rights and interests the assignee must give proper recognition.

An order will be drawn in accordance with the foregoing opinion. If the parties agree on the form thereof it will be entered, if not, any party may have the same settled on five days' notice.

Armitage agt. Hoyle *et al.*

SUPREME COURT.

MARY ARMITAGE agt. THOMAS HOYLE *et al.*

Custody of minor children — Right of parents to dispose of — Laws of 1871, chapter 22 — Injunction — Action will lie and injunction will be granted to prevent interference with the person to whom such custody has been given.

By the Revised Statutes, as amended by chapter 83 of Laws of 1871, a father may by deed or last will duly executed, dispose of the custody and tuition of any child under the age of twenty-one years and unmarried during its minority.

Where a father has by deed duly executed, disposed of the custody and tuition of a minor child, and the person to whom such disposition has been made has accepted the same; an action will lie to enforce the rights of such person, and an injunction will be granted restraining the interference of not only the father, but of all persons acting under him and by his procurement, with the rights of such person to such custody and tuition under said deed.

The injunction in such actions run not only against a party, but also against his attorneys, counselors, agents, &c.

Cayuga Special Term, July, 1885.

MOTION for injunction *pendente lite*.

F. D. Wright, for plaintiff.

L. E. Warren, for defendant.

ANGLE, J. — The principal defendant, Thomas Hoyle, with his wife, who was a daughter of the plaintiff, on the 5th December, 1883, by a deed duly executed by them, disposed of the custody and tuition of their infant daughter Edith Evelyn Hoyle during its minority to the plaintiff, as provided by the Revised Statutes, as amended by chapter 32, Laws of 1871. This deed was recorded in Cayuga county clerk's office on the 21st day of July, 1884, having been first duly acknowledged. At the time of the execution of this deed, Mrs. Hoyle was fatally ill, and she afterwards died. The plaintiff accepted the custody and tuition of the child under said deed. The

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moving papers abundantly establish that Thomas Hoyle and persons acting under him and by his procurement, interfere with the rights of the plaintiff to such custody and tuition, and annoy and embarrass her in the exercise of her rights under said deed. No question is made as to the validity of the deed and it is valid and effectual against the father of the infant. The action is to enforce the rights of the plaintiff under the deed and to compel a regard for these rights in the defendants.

A precedent for the action is found in *Swift agt. Swift* (34 *Beav.*, 266), a case in which by articles of separation between husband and wife, the former covenanted that their "two children should at all times thereafter be under the sole care, management and protection of the wife." Afterwards the husband endeavored forcibly, but ineffectually, to obtain possession of one of the children, in consequence of which the wife commenced an action praying for an injunction to restrain the husband from removing from or prosecuting any proceedings to obtain the children from her custody, or interfering with her in their care, management and protection, and the master of the rolls awarded an injunction.

The case of *Swift agt. Swift* presented other features, among which was the principle of the English law that it was against public policy for a parent, by contract, to deprive himself of parental authority and power; but that case is clearly an authority under our statute for an injunction in the present case.

There is nothing in the papers to warrant a suspicion that plaintiff's contemplated visit to England is in bad faith, or with intent not to return with the child; and even if it were so, the authorities cited by plaintiff's counsel seem to hold that she has the right to change the domicile of the child.

It was strongly urged by counsel for the defendants that it would be an unwarrantable assumption of jurisdiction to restrain attorneys and counselors from practicing their profession by taking such legal proceedings, by *habeas corpus* or otherwise, as they might deem proper for the protection of

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the rights of clients. But the restraining of proceedings at law is an old head of equity jurisdiction, and in such actions the injunctions run, not only against a party, but also against his attorneys, counselors, agents, &c.

The plaintiff is entitled to an injunction substantially as prayed for in the complaint, and if counsel cannot agree upon the form it will be settled upon notice of four days.

Ten dollars costs of motion to the prevailing party in the action, to abide the event.

SUPREME COURT.

PETER BOWE, respondent, agt. THE UNITED STATES REFLECTOR COMPANY and others, impleaded, &c., appellants.

Sheriff's fees — Attachment — Code of Civil Procedure, section 709, declared unconstitutional.

The provision of section 709 of the Code of Civil Procedure permitting the sheriff to hold property taken under an attachment after the warrant of attachment has been vacated on the application of defendant, until his costs and expenses have been paid, and sell it for their payment, is unconstitutional, as being in effect to allow him to hold and dispose of the property of one party to pay the debt exclusively of another (*See Hall agt. United States Reflector Company, 66 How., 51*).

First Department, General Term, September, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an interlocutory judgment overruling demurrer to plaintiff's complaint.

Edward P. Wilder, for appellants.

Malcolm Graham, for respondent.

DANIELS, J.—The object of this action is to obtain a judgment declaring the plaintiff, as late sheriff, to have a lien upon

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certain personal property for his fees, disbursements and expenses, and for the sale of the property to satisfy the same. The property consists of a stock of manufactured articles and other things seized by the sheriff under an attachment issued in favor of Bolton Hall and others against The United States Reflector Company.

After the seizure of the property it remained in the possession of the sheriff until on or about the 5th of May, 1883, when it was ordered in the action that the warrant of attachment be vacated, annulled and set aside, unless the plaintiffs should increase the security given by them upon the attachment. They failed to do that, and "on the 5th of June, 1883, it was ordered that said attachment be vacated, annulled and set aside." A copy of this order was served upon the plaintiffs, with notice of its entry, and it has remained in force in the action ever since that time. The fees, expenses and disbursements of the sheriff under the attachment were adjusted, and upon the sum allowed the plaintiffs paid the sheriff \$3,740, leaving a balance still unpaid to the sheriff of \$5,429.78. The attached property has remained in the possession of the plaintiff, notwithstanding a demand made for its delivery on behalf of the defendants in the action, and it is for the collection and satisfaction of this balance that the plaintiff is now proceeding by this action to enforce it as a lien in his favor against the attached property, and for which it is claimed that the sale of the property shall be made.

This right on the part of the sheriff is asserted to have been created by section 709 of the Code of Civil Procedure, and it has been directed by it that, where a warrant of attachment is vacated or annulled, or an attachment is discharged upon the application of the defendant, the sheriff must, except in a case where it is otherwise specially prescribed by law, deliver over to the defendant or to the person entitled thereto, upon reasonable demand and upon payment of all costs, charges and expenses legally chargeable by the sheriff, all the attached personal property remaining in his hands, or that

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portion thereof as to which the attachment is discharged, or the proceeds thereof if it has been sold by him. The right of the sheriff to hold the property after the discharge of the attachment has been denied by the defendants, who claim that the legislature had no authority to subject it to the obligation of paying the sheriff's costs, charges and expenses after the attachment had been discharged.

The attachment was not issued at the instance or under the authority of either of the defendants, but solely at the instance and upon the application of the plaintiffs in the action. It was as to the defendants an adverse proceeding, whose object was to seize the property of the party against whom the attachment was issued and hold it as a security for the plaintiff's demand in the action. By such a proceeding the owner of the attached property entered into no obligation or duty to pay its costs, charges or expenses. But so far as a liability for their payment would arise out of the facts, it must be exclusively that of the persons in whose favor and at whose instance the attachment was issued and the property was seized. Its seizure arose out of no fault of the defendant, as has been demonstrated by the fact that the attachment has been voluntarily abandoned, and also set aside by an order of the court. But without its consent its property was taken under it and placed in the possession of the sheriff, where, since its seizure, it has remained. To permit the sheriff to hold it now, after the attachment has been set aside, until his costs, charges and expenses have been paid, and sell it for their payment, would be to allow him to hold and dispose of the property of one party to pay the debt exclusively of another. For no further proceedings can be instituted or maintained in this action which will convert his demand into a legal liability of the defendant proceeded against. It must still remain and continue to be a demand owing by other parties, and the point, therefore, arises to be determined whether the legislature has the authority to provide that the property so seized after the discharge of the attachment can be applied or appropriated by

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the sheriff to the payment and satisfaction of such a demand. To apply and appropriate it in that manner is to take the property of one party against his or its consent and apply it to the payment or discharge of the obligations of another, and that has not been considered to be within the authority of the legislature.

Upon this subject care has been taken to preserve and protect the rights of the owners of property against interference of this description, even though that may have been provided for by an act of the legislature. To prevent such interference it has been declared that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to the citizens thereof, unless by the law of the land or the judgment of his peers." "Nor be deprived of life, liberty or property without due process of law" (*Const.*, art. 1, *secs. 1 and 6*). And these provisions have been so construed as to maintain the rights of property against mere legislative interference, and as requiring a legal proceeding following other ordinary forms of law, and in resulting in a judgment upon some obligation or contract or liability incurred by the party proceeded against before he can be divested of his property and it can be applied to the uses of another party. They protect the owner against the taking of his property by color of legislative authority, to bestow it upon, or give, or devote it to the uses of another person. This was generally considered in *New York and Oswego Railroad Company agt Van Horn* (57 *N. Y.*, 473). And it was held by the court that the legislature never can take the property of one individual without his consent and give it to another. And this salutary general principle has also been maintained in *Embury agt. Connor* (1 *Const.*, 511-517); *Taylor agt. Porter* (4 *Hill*, 141); *Wiesmer agt. Douglass* (64 *N. Y.*, 91, 105). That is precisely — where an attachment has been set aside, vacated or annulled, either by the abandonment of the party in whose favor it is issued or by an order of the court — what this section of the Code has provided may be done with the

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property of the defendant when it has been seized under an attachment. This direction in its practical effect is to take the property of the defendant after the lien of the attachment has in this manner been removed and apply it to the payment of the debt created by issuing and serving it, and afterwards detaining the defendant's property under its authority; and no more flagrant violation of the rights of an owner of property can well be imagined. If it should be sustained there will be nothing to prevent a repetition of what seems to have taken place in this instance, that the defendant's stock in trade shall be taken into the possession of the sheriff, his business interrupted and for the time destroyed, and when the attachment can be no longer maintained, to leave him, as the only alternative for resuming the possession of his property, the payment of the costs, fees and expenses of the proceedings by which he may have been despoiled. And it was in part to protect parties against disasters of this description that those constitutional provisions were adopted, and to prevent them from being produced by the mere fiat of a legislative direction.

It will be no answer to the protection which these provisions of the Constitution were designed to afford that the person whose property may be taken from him and held by the sheriff until he shall pay his costs, charges and expenses, may reimburse himself for the amounts paid by a suit upon the undertaking. For that will ordinarily afford him no equivalent for the loss and destruction of his business after it has been brought about in this manner.

A suit upon an undertaking where the defendant's stock in trade may have been taken from his possession, and his business interrupted and suspended, would afford him no redress for the most serious injury he will appear to have sustained. For the loss to which he be subjected by the interruption of his business must usually be incapable of being proved in such a manner as to render it the subject of compensation in an action. But if that could be proven the perplexity, delay and suspense to which the defendant would

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necessarily be subjected in the prosecution of an action would to a great extent deprive him of anything like adequate redress for the injury inflicted upon his affairs. Then, before an action even upon the undertaking could be maintained, the costs, charges and expenses of the sheriff would require to be paid, and it is not every person whose property may be seized and whose business may be thereby interrupted, who would have the ability to raise the money required to make such payments. That may very well be the position of the defendant against which the attachment issued in this case. For before possession of its property can be assumed, it has been required under the authority of this section of the Code to raise and pay to the sheriff this large sum of \$5,429.78. An action the right to maintain which can only be secured in this manner, must evidently fall far short of adequate means of redress to the party whose property may be seized and held in the manner in which this stock was taken and held by the sheriff. It would not justify legislation of the description of that contained in this section of the Code. For it would permit the taking of the property of another and applying it to the discharge of the obligation of the party taking it, without affording any adequate means of redress for the wrong so committed.

The case of *Woodruff* agt. *Imperial Fire Insurance Company* (90 *N. Y.*, 521) in no manner tends to maintain the authority of this legislation; for there the defendant settled with the plaintiffs, paying the amount of his claim, and thereby conceded the regularity of the attachment, which might very well primarily subject him to the payment of the sheriff's costs, charges and expenses, while in this case there was no such concession in any form whatever; but the regularity of this seizure was practically superseded by the order made vacating the attachment. The case of *Hall* agt. *United States Reflector Company* (66 *How.*, 31), does not consider the power of the legislature to devote the property of the defendant in an attachment after it has been annulled or

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vacated, to the payment of the fees and expenses not in any manner created or incurred by its owner, but it in effect declined to consider the rights of the sheriff, as it there appeared that they were being made the subject of determination in other legal proceedings, and no authority has been found lending its sanction to the theory that the legislature may subject the property of a defendant to the payment of the sheriff's fees and expenses, after his entire power over it has been ended by vacating or setting aside the attachment. The principle is entirely different from that which has been held to sustain the right of a receiver to compensation from the property itself or its owner after it has been remitted to the care and protection of such an officer in the course of legal proceedings.

That was the case of *Hopfensach* agt. *Hopfensach* (61 *How.*, 498). There the property was held and preserved for the benefit of all the parties to the controversy, and for that reason it was properly decided that the receiver could not be divested of his possession without the payment of his fees, while here the property was not taken or held in any sense for the benefit of the defendant in the attachment, but that was exclusively for the advantage and benefit of the plaintiff. So far, therefore, as the claim of the sheriff against the property consisted of costs, fees and expenses, unauthorized or sanctioned by the defendant in the attachment, he had no lien upon or right of possession to the property which had been taken under the attachment. And to that extent no legal authority exists in support of his action brought to sell the property for the satisfaction of his costs, charges and expenses.

At the time when the property was taken it was in the store known as No. 4 Great Jones street, and both the plaintiff and the president of the defendant in the attachment entered into a stipulation by which they agreed that the sheriff should pay the rent then owing for the premises and such rents as should afterwards fall due until the property

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should be finally disposed of, and that the rent should be treated and regarded as expenses of the sheriff in this action under the process held by him. This stipulation and another of the like effect afterwards made seem to have been entered into upon the understanding that the sheriff could hold the property for his fees and expenses under the attachment, and to induce him to pay the rent and protect himself in this manner because of this understanding. He did pay for the rent of these premises after these stipulations were made, and before his right to do so under their authority was in any manner withdrawn or denied, the sum of \$3,605. And for so much of that as was not discharged by the payments which the plaintiff made to the sheriff on account of his fees and expenses, he had the right to hold this property. For it is fair to assume that he would not have paid this rent if these stipulations had not been entered into. He was induced by them to make the payments, and that was done by the concurrence and authority of the defendant in the attachment as well as that of the plaintiff. And after having induced him to make such payments with the expectation and implied assurance that the amounts paid should be secured by the property attached, the defendants are not at liberty to deny the right of the sheriff to this remedy. So far as he holds the property for the rent paid, this action may well be maintained. To that extent the sheriff has a right of action for the sale of this property to reimburse him for the amount still owing to him, which was paid out upon the faith of these stipulations. But beyond that he has no right to proceed against this property for the satisfaction of his costs, charges and expenses. As, however, something still remains due to him on account of the rent paid, the action to that extent must be maintained, and that will require the judgment from which the appeal has been taken to be affirmed, but with liberty to the defendants to withdraw their demurrers and to answer on payment of costs.

DAVIS, P. J., and BRADY, J., concurred.

Schneider *et al.* agt. Altman.

NEW YORK CITY COURT.

PETER SCHNEIDER *et al.* agt. IGNATZ ALTMAN.

Supplementary proceedings — Assignment for benefit of creditors — Examinations not limited — Code of Civil Procedure, section 2480.

In examinations in supplementary proceedings in the city court, where it appears that the judgment debtor has made a general assignment for the benefit of his creditors, the examination need not be limited to property acquired since the assignment.

General Term, September, 1885.

Before HAWES and HALL, JJ.

HAWES, J.—It appears from the record that the defendant, a judgment debtor, was under examination in proceedings supplementary to execution, and that while being examined the fact was disclosed that he had made a general assignment to one Charles Cass, for the benefit of his creditors. Upon such disclosures, the defendant's counsel objected to any and all questions "relating back prior to the filing of the assignment." This objection was sustained, the court holding that "the examination must be limited to property acquired since the assignment," to which an exception was taken, and this ruling and exception is now presented for review.

It is quite clear that as to property acquired prior to the assignment, an examination could only furnish proof of its fraudulent disposition, and the judgment creditor would, in one sense, be securing evidence and not property, and as this court possesses no equitable jurisdiction, and could not entertain a suit to set the assignment aside, the judgment creditor could secure no advantages in this tribunal, and for economic reasons the examination has frequently been restricted to after acquired property.

I am unable, however, to see how this course can be sustained upon any legal or equitable principle. It is well settled

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in the court of common pleas that "no examination will be allowed which seeks to set aside the assignment, and will only be permitted where it is in aid of it." The examination should not extend to an inquiry as to whether the preferences are fraudulent, or as to whether the assignors, either in making the assignment or in transactions anterior to the assignment, did any act that was fraudulent in fact or fraudulent in contemplation of law. No inquiry as to what the assignors, prior to the assignment, did with the borrowed money or with their own property should be permitted (*In re Rindskopf*, *Dist. Ct. Jour.*, January 9, 1885, *opinion by VAN HOESSEN, J.*; see to same effect, *Matter of Everitt*, 10 *Daly*, 99). Nowhere else can an examination therefore be had as to the property of the judgment debtor concealed under the guise of a general assignment, except in the court where the judgment was obtained, and in all fairness it would seem that they were justly entitled to it. They are invited to this forum, and after the recovery of a judgment they find themselves powerless to investigate concealed property.

All the other courts of record in this department allow such an examination (*Seligman agt. Wallach*, 6 *N. Y. Civil Pro. R.*, 232; *Bennigan agt. Piek*, *Chambers Sup. Ct.*, May, 1884, *unreported*; *Mechanics and Traders' Bank agt. Healy*, 14 *N. Y. Weekly Dig.*, 120), and I am unable to see why the judgment creditor is not legally entitled to it as a matter of right. The mere fact that he must bring another proceeding, and that that must be in another forum, does not affect his rights. In nearly all cases where fraudulent transfers have been made, and the apparent title is in a third person, he is compelled to bring an action, and in doing so he can select his own tribunal; but it would not for a moment be held that therefore he should not be allowed to inquire as to this concealed property. There is nothing sacred about a general assignment as distinguished from any other. If a judgment debtor fraudulently disposes of some of his property, and places it in the apparent ownership of a third person, an

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examination as to such disposition is allowed; but if he so disposes of all his property, an opposite rule has prevailed in this court; but I find no warrant for such a conclusion either in the Code or in the equitable treatment which the court owes the suitors who seek its protection. The Code (*sec.* 2460) expressly provides that a party shall not be excused from answering a question on the ground that his examination will tend to prove that he has been "a party or privy to, or knowing of a conveyance, assignment, transfer or other disposition of property for any purpose." The examination of a judgment debtor is designed to be liberal and exhaustive, and to discover if possible any property which the judgment debtor may have, wherever located, and whoever might hold the apparent title.

Property fraudulently conveyed to a general assignee involving fraudulent preferences and fictitious debts is still in equity the property of the judgment debtor and its discovery under such circumstances is not the discovery of evidence, but the actual discovery of property, and its recovery is solely a question of practice and procedure which is but a mere incident. A general assignment is simply a personal disposition of property, and the law has thrown about it no special safeguard. The property so conveyed is subject to the claims and demands of creditors in any form or method of proceeding which they may institute to reach it, and to protect a fraudulent debtor in such concealment has, in my opinion, no warrant or justification in law. The case of *Lathrop agt. Clapp* (40 *N. Y.*, 328), cited by appellants, presents this question fully and conclusively.

It may be irksome for this court to allow these examinations with full knowledge that the court can grant no relief for its recovery by reason of its want of equity jurisdiction, but this furnishes no sufficient reason why its litigants should be deprived of their rights to discover the property of a judgment debtor, however concealed or transferred. The method by which the judgment creditor shall secure its possession, is,

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in my view of the case, a subject wholly foreign to the question at issue. Such an examination clearly tends to discover the judgment debtor's property, and that fact is sufficient to justify the question asked in the case at bar, and all other similar questions.

Order reversed, with costs to appellants.

SUPREME COURT.

SAMUEL BONNELL, Jr., agt. CHESTER GRISWOLD.

Manufacturing corporations — Abatement and revivor — Cause of action to recover penalties — Does not abate on death of sole plaintiff.

A cause of action to recover the penalties imposed by sections 12 and 15 of the general manufacturing law does not abate on the death of a sole plaintiff (although otherwise on the death of a sole defendant), but may be revived and continued by and in the name of the personal representatives of the deceased plaintiff.

Special Term, May, 1885.

THE complaint set forth three causes of action, one for a failure to make and file a report, as required by section 12 of the general manufacturing law, one for making a false report, within the meaning of section 15 of said law, and the other for entering into a fraudulent scheme to form a bogus corporation thereunder. The case was tried before the court without a jury, and while under advisement the plaintiff died. Thereupon this motion was made to revive and continue the action by and in the name of the personal representative of the plaintiff.

A. Pond, for motion.

Wm. C. Holbrook, opposed.

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BOOKES, J.—Motion to revive and continue the action by and in the name of the personal representative of the plaintiff, who has died since its trial and while the case was in the hands of the trial judge for decision.

The action was by Bonnell, sole plaintiff, against Griswold and others, to recover against them for penalties imposed by section 12 of chapter 40 of the Laws of 1848 and amendments thereof. The plaintiff having died, revivor and continuance of the action are now asked for by his administrator. The answer to the motion is this: that the action being for penalties imposed by statute, abated by the plaintiff's decease. The death of a defendant in such an action would produce an abatement of it as to such deceased party (*Stokes agt. Stickney*, 96 N. Y., 323), and as was held in *Reynolds agt. Mason* (54 How., 213; *S. C. on appeal*, 6 W. D., 531), a like result would follow by the death of the plaintiff. It seems that the affirmance in the last case cited was put solely upon the doctrine of the previous decision in the *Bank of California agt. Collins* (5 Hun, 209), which, unlike the present, was a case where revivor and continuance was asked for against the executor of a deceased defendant, as in *Stokes agt. Stickney*.

In *Carley agt. Hodges* (19 Hun, 187), the decision in the *Bank of California agt. Collins* was not deemed applicable or controlling in a case like the present, and it was held in the former case that the right of action survived to the executor of the deceased creditor. The question now before me arising upon the decease of a plaintiff does not seem to have been authoritatively decided, unless we accept *Carley agt. Hodges* as decisive of it. As a necessary inference it would seem to follow from many decisions that the action may be continued by and in the name of the personal representative of the deceased plaintiff. Actions based upon a claim that is assignable may be thus revived and continued; and an assignment of such claim against the company would carry a right of action to the assignee for the penalty imposed by section 12 of the Act of 1848 (*Pier agt. George*, 86 N. Y., 613; *Bolen*

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agt. *Crosby*, 49 *N. Y.*, 183; *Hoag* agt. *Lamont*, 60 *N. Y.*, 96). So in *Stokes* agt. *Stickney* (96 *N. Y.*, 323, *above cited*), it is said that the statute of 1848, providing for this cause of action, gives it to the creditors of the corporation, and the debt itself being assignable, it follows that whoever becomes the owner thereof takes as the incident thereof the right to the penalty, and is by the terms of the statute, entitled to maintain the action (*page 327*). This, too, is the doctrine of the decision in *Carley* agt. *Hodges* (19 *Hun*, 187, *above cited*).

Now, the administrator of the deceased plaintiff as such has become the owner of the claim against the corporation, which claim constitutes the foundation of the right of action, with the incident thereof, to wit, the right to the penalty; and, again, quoting from *Stokes* agt. *Stickney*, "is by the terms of the statute entitled to maintain the action." Indeed an administrator is deemed in law to be the assignee of the assets of the estate which he represents. Judge DENIO says, in *Zabriskie* agt. *Smith* (13 *N. Y.*, on *page 333*), "an administrator represents the person of the deceased, and is in law his assignee."

In view of these decisions in the court of appeals, I think I must hold that this action may be revived and continued by and in the name of the administrator of the deceased plaintiff.

Motion granted.

People *ex rel.* Pres., &c., of D. & H. Canal Co. agt. Roosa and others.

SUPREME COURT.

THE PEOPLE *ex rel.* THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY agt. ZACHARIAH ROOSA and others, assessors of the town of Marbletown.

Assessments — How the value of railroad or canal property is to be determined.

Although in determining the value of railroad or canal property, for the purposes of taxation, the cost of creating it may be considered, yet its earning capacity should be the more controlling consideration or test.

Ulster Special Term, June, 1885.

CERTIORARI to review assessments.

Peter Cantine, for relator.

J. Newton Fiero, for respondents.

WESTBROOK, J.—By separate writs of *certiorari* prosecuted under chapter 269 of the Laws of 1880 the relator seeks to review its assessments in the town of Marbletown, Ulster county, in the years 1882 and 1883. A referee was appointed to take the evidence and the proceedings are now submitted, after argument, upon the report of the referee.

The relator owns a canal extending from Eddyville, the head of navigation upon the Rondout creek, in the county of Ulster and state of New York, to Honesdale in the state of Pennsylvania.

The total length of the canal is 108 miles, four miles of which are within the town of Marbletown. The total assessment of the relator in such town is \$180,000, all of which is for the canal, except about \$10,000 which is for other property. The valuation of the canal in the town is about \$42,500 per mile.

The total assessed value of personal property in the town is \$10,450 for the year 1882 and \$12,025 for the year 1883.

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No evidence was given in regard to these valuations, and their correctness will, for the purposes of the present proceeding, be assumed, though it seems incredible that in an entire town of the wealth and size of Marblétown the amount of personal property liable to taxation is so inconsiderable.

It is conceded that all the real estate in the town with the exception of that of the relator is valued upon the rolls for the years 1882 and 1883 at forty-four and seven-tenths per cent of its actual value. This admission renders unnecessary any discussion as to the valuation of such other property and narrows it to one single point, the value of the canal per mile.

In view of the fact that the assessors of the town concede they have valued all the real estate of the town, with the exception of that owned by the relator, at less than half its actual value, it is not improper to say that they admit a clear violation of the statute, which declares: "All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor" (2 R. S. [7th ed.], 992, sec. 17). In view of the same concession it is difficult to conceive how the respondents could swear, as they did swear for two years, and as the statute required them to do (2 R. S. [7th ed.], 994, sec. 8), that in the valuation of the real estate in the town they had complied with this enactment. It is perhaps, however, due to the respondents to say that, doubtless, long practice in their town, which, believing to be right, they adopted, somewhat softens the moral view to be taken of their conduct, but the bald fact still remains that there has been a gross and clear departure from a very plain statute.

In ascertaining the value of property, similar to that owned by the relator, this court held in the *The People ex rel. The Wallkill Valley Railroad Company agt. Keator and others* (67 How., 277), recently affirmed at general term, but as yet unreported, and in *The People ex rel. The Albany and Greenbush Bridge Company agt. Weaver and others* (67 How., 477),

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also affirmed at general term (34 *Hun*, 327), and likewise in the court of appeals, that its earning capacity was largely the test.

The canal of the relator, as shown by its acts of incorporation, and as is well known in fact, was built to supply an avenue to bring its own anthracite coal from its mines in Pennsylvania to the Hudson river. The transportation of such coal to market is the principal use of the canal. The total amount of tolls received by the relator, for the use of its canal by other parties, was \$60,007.52 in the year 1882, and \$52,403.39 in the year 1883. The cost of operating and maintaining the canal was \$175,617.42 in 1882, and \$183,525.58 in 1883. As the results for the two years referred to are not phenomenal, but are a fair average of a number of years, it is safe to say that the cost year by year of maintaining and operating the canal is three times as great as its receipts. It is true that in making this statement no allowance is made for the coal belonging to the relator which passes over the canal, for that pays no toll, and therefore furnishes no revenue, though it must be more or less of a benefit to the relator. The total amount of the revenues of the canal is, however, an important factor to ascertain its value for the purposes of taxation; and in this connection the further fact must be considered that while the canal originally was the sole outlet for the relator's coal, the cost of transportation thereover, as compared with that by rail, has diverted more than two-thirds of the production of its mines from that avenue to others created by railroad.

The assessors are not, however, to value the property according to its needs to the relator, but "at its full and true value as they would appraise the same in payment of a just debt from a solvent debtor." Applying this test, at what sum should the canal be valued? The buyer would be informed that the receipts of the canal were far less than its maintaining and operating expenses to be paid out. If he had no coal to transport to market he would probably conclude that it was not

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worth the taking if it was to be maintained and operated, and if he had the coal for the carrying of which he could utilize the property he would naturally insist that if he took such an old and obsolete way as a canal, it should be put to him at a price so cheap that it would better pay him to put his capital in it than in a railroad.

Under circumstances such as have been described it is difficult to value the property. The day of canals has clearly gone by. Not only is this shown by the evidence of the relator, but the history of those owned by the state demonstrates that they can no longer be a source of revenue to their owners. Feeling the force of this fact the witnesses called by the relator (principally its officers, with the exception of Mr. Stevens an eminent canal and railroad engineer from New Jersey), value the canal at a sum not exceeding \$8,000 per mile, while some of them regard it as of no value except for the bed of a railroad to be constructed. Nor is this evidence substantially controverted by the respondents. One of their two witnesses on valuation, Mr. Sweet, makes its value computed upon its cost \$50,000 per mile, but he declines to give an estimate of its value based upon its capacity to earn money. It is difficult, as has been before stated, to say what valuation should be put upon the property. If its value is estimated by its earning capacity, solely, to a buyer other than the present owner (to whom it is of some value to transport its own property), as the statute contemplates, it would be worth nothing.

No person not the owner of coal lands in Pennsylvania would take it as a gift if the gift was coupled with a covenant by him to maintain and operate it as a canal; and the owner of coal lands, who had to find an outlet for the production would only pay a price, which by its cheapness would make it an object for him to invest his money therein rather than in a railroad. The relator, however, owns this property, and has coal in Pennsylvania to be mined and to be transported. It must, for that purpose, have some value or it would be abandoned. It forms a part of the property of the town, and

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should bear a part of its burdens. Mathematical accuracy is impossible, but if it is valued at a sum twice as great as the highest value placed upon it by the relator's witnesses, the respondent will have no cause of complaint. It is clearly overvalued upon the tax rolls. Taking into account the earning capacity of the canal it is plain that it should not be valued beyond \$16,000 per mile. It is a sum believed to be greater than any creditor of the relator would receive it for in extinguishment of its debts; and the taxable valuation is fixed at that sum as being the very highest which the testimony will warrant. As the relator's property should be taxed at the same rate with that of all other property in the town, the conclusion is that during the years 1882 and 1883 the valuation of the canal should have been at a sum which forty-four and seven-tenths per cent of \$16,000 per mile would produce, and at the same per cent upon \$10,000 of property other than the canal.

The remaining question is one of costs. The highest valuation placed upon the canal of the relator, and that was an estimate based upon cost, and not its earning capacity, was \$50,000 per mile. With what justice did the respondents estimate its value at \$42,500 or thereabouts per mile; when they knew they had estimated their own property and that of their neighbors by a different rule? Will they pretend that they valued the property of the relator, as they did that of others, at only forty-four and seven-tenths per cent of its actual value; or must they admit that while swearing to act impartially they have done the reverse? If the property of the relator was valued at the same rate as that of others, they must have deliberately determined that its actual value per mile was about \$95,000, a sum so much in excess of their own evidence that it is difficult to predicate good faith in their action. Perhaps, however, charity requires the conclusion that the errors are mistakes rather than crimes, and acting upon that assumption no costs will be imposed.

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SUPREME COURT.

GEORGE THATCHER *et al.* agt. CARL B. RANKIN.*Removal of causes to United States courts — Cause for removal — Steps to be taken.*

Where the petition for removal of a cause from the state court to the United States court is made by a plaintiff who claims that he is a resident of New Jersey and that the defendant is a resident of New York, before or at the time of filing such petition, the petitioner must make and file in the state court an affidavit that he has reason to believe, and does believe, that from prejudice or local influence, he will not be able to obtain justice in such state court.

Where a petitioner fails to comply with this requirement he cannot accomplish the removal of the action.

Where the petition and bond have been "accepted, allowed and approved" by a justice of the state court, such acceptance, allowance and approval imply that said justice was satisfied, and decided that the amount in dispute did exceed the sum of \$500; and if such decision can be reviewed at all in the state court, the application, if made to a judge other than the one who made such decision, must be on notice of motion to set aside such acceptance, allowance and approval as having been improvidently made.

Special Term, July, 1885.

ANDREWS, J.—It seems to me that this action is still in this court. It is doubtful whether it involves more than \$500, as the term of employment is of uncertain duration, but the act of congress requires that the fact that the amount or value in dispute exceeds \$500 should "be made to appear to the satisfaction" of the state court when the petition and bond are presented. The petition and bond in this case have been "accepted, allowed and approved" by a justice of this court, and such acceptance, allowance and approval imply that said justice was satisfied, and decided that the amount in dispute did exceed the sum of \$500; and if such decision can be reviewed at all in this court, the application, if made to a judge other than the one who made such decision, must be

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on notice of motion to set aside such acceptance, allowance and approval as having been improvidently made.

I think, however, without regard to the question as to the sum in controversy, that the petitioner has failed to comply with the act of congress in an important particular, and for that reason has not accomplished the removal of the action to the United States circuit court.

The petition for the removal was made by the plaintiff, who claims that he is a resident of New Jersey, and that the defendant is a resident of New York. The right to remove the action therefore depends on subdivision 3 of section 639 of the United States Revised Statutes, which requires that before or at the time of filing the petition, the petitioner must make and file in the state court an affidavit that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court.

Upon my request to the clerk to be furnished with all the papers filed in this action I have received several, but there is no such affidavit among them, and I conclude, therefore, that no such affidavit has been filed.

As the petitioner has apparently failed to comply with this important requirement of the act of congress, it seems to me that the action is still pending in this court, and I should now give the plaintiffs an opportunity, if they desired it, to be heard on the merits of the motion to continue the injunction, but for the fact that, on looking over the papers submitted by the defendant, I am convinced that the injunction cannot be dissolved.

The defendant entered into a written contract, whereby he engaged himself to the plaintiffs, for the season, and as it would be impossible for them to prove their damages in an action at law, they are entitled to the injunction.

The statements in the defendant's affidavit as to what Primrose told him do not amount to such an allegation of fraud in inducing the defendant to make the contract as, if true, would

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enable the defendant to have the contract annulled on that ground. The failure of the plaintiffs to reply to defendant's telegram did not authorize him to make another engagement nor in any way operate to relieve him from the obligations of his contract with the plaintiffs.

The motives of the plaintiffs in holding the defendant to the performance of his contract cannot be inquired into, nor is it material how many or how few contracts the plaintiffs have made in the belief that the defendant would keep his engagement.

As I have reached this conclusion from an examination of the defendant's papers, I shall return all the papers to the clerk, and the respective attorneys will take such course as they may think proper in regard to submitting or not submitting an order to be entered on this decision.

SUPREME COURT.

JOSEPH J. O'DONOHUE *et al.*, respondents, agt. ZACHARIAH E. SIMMONS, appellant.

Sheriff — Bond of indemnity — Liability of the sureties thereon.

In an action upon a bond of indemnity to the sheriff, it was error to refuse to charge the jury that if neither the sheriff nor any of his deputies judged the property taken under the execution in reference to which the indemnity applied was owned by the judgment debtor, then the defendant was entitled to a verdict.

First Department, General Term, September, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from a judgment rendered upon a verdict.

A. M. Whitehead, for appellant.

James M. Smith, for respondent.

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BRADY, J. — This action was brought by the plaintiff's upon a bond of indemnity executed by the defendant and one Michael S. Purcell (since deceased) to the plaintiff's assignor, James O'Brien, then sheriff of the city and county of New York. The case is here for the second time on appeal, and several of the questions which are now presented are kindred to those already passed upon on the first appeal, the result of which is reported in 31 *Hun* (p. 267). It is not at all improbable that a consideration of all the other exceptions in the case would result favorably to the respondents, but it is not deemed necessary or advisable to consider them for the reason that one exception appears to be fatal to the maintenance of the judgment. The bond is in the usual form of a bond of indemnity, and provides for protection to the sheriff and all persons assisting him from any damages that might accrue to him or them for levying, attaching and making sale under and by virtue of the execution, of all or any personal property which he or they should or might judge belonged to the judgment debtor named.

The defendant's counsel requested the court to charge that if neither the sheriff nor any of his deputies judged the property taken under the execution in reference to which the indemnity applied was owned by the judgment debtor, then the defendant was entitled to a verdict. The court refused so to charge, and an exception was duly taken. What was said on that subject, if anything otherwise, does not appear, inasmuch as the charge is not given in the record. As said in the case of *Clark agt. Woodruff* (83 *N. Y.*, 525) "it is never the purpose of these indemnities to make the obligors responsible for trespass which they do not direct or authorize. We should not yield to such a construction. The mischiefs resulting would be very great, not only to the parties and to the public, but to the officers themselves." And in the same case in the supreme court (18 *Hun*, 423) it was said: "It can hardly be supposed that the parties who executed the bond intended to create a roving commission by which the

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plaintiff would be at liberty to seize by way of experiment, any property which he might even judge to belong to others, and rely upon such bond for protection against loss."

The refusal of the judge to charge the proposition stated, necessarily results in a declaration of a converse proposition, namely, that the defendant would be responsible, if property should be taken by the sheriff which neither he nor his deputies judged to be the property of the judgment debtor, and thus would sanction the seizure of property in the language of *Clark agt. Woodruff (supra)* by way of experiment. The mere fact of the levy is not to be construed, when an issue is created in regard to it, as the exercise of judgment or an act in conformity to the bond. A jury may be called upon to determine whether the levy was made within the spirit of the bond itself which was designed to secure the appropriation of the property of the debtor, if, in the judgment of the officer intrusted with the execution of the process, it was proper to levy upon and thus to secure its appropriation to the payment of the judgment.

It is no answer to this proposition that there was no conflicting evidence on the subject of the levy. It may be said that except from the mere act of levying there is no evidence that the property was judged to belong to the judgment debtor by the persons who made the levy. At all events, as already suggested, the defendant was entitled to a submission of the question to the jury, and which was rejected as we have seen, whether the act of the sheriff upon which his liability rested was done in conformity to the bond.

For these reasons the judgment should be reversed and a new trial ordered.

DANIELS, J., concurred.

DAVIS, P. J. (*dissenting*).—The official act of levying property under an execution was sufficient *prima facie* evidence that the officer judged it to belong to the defendant in the execution. There was nothing in the case rebutting or

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impairing this *prima facie* evidence, and therefore no occasion to make the charge requested. If there had been a controversy by evidence so as to make an issue on the question whether or not the officer judged the property levied on to be that of the execution defendant, then the charge requested would have been proper and its refusal fatal. Otherwise it was not error to decline to charge at all on that question.

I dissent from the conclusion that, on the ground considered in the opinion of BRADY, J., there should be a reversal and new trial.

SUPREME COURT.

FREDERICK BAKER, respondent, agt. GEORGE JOHNS and CHARLES NETZ, appellants.

Ejectment — Lease — Indian reservation — Who entitled to renewal of lease under act of congress — Evidence.

By the act of congress, approved February 15, 1875, it was provided that the then existing Indian leases should be valid and binding for the term of five years thereafter, unless by the terms thereof they expired before that time. The same act gave the holder of such leases the right to a renewal thereof in case he was the owner of "improvements erected upon" the land leased.

George Jemison, a Seneca Indian, residing on the reservation, made to the plaintiff a lease of certain premises (of which those in question are a part) for the term of twelve years, and on the 16th day of June, 1875, the same Jemison executed and delivered to the defendant Johns a lease of the land in question, and the defendant Netz is his tenant, and in possession. Under the act of congress the defendant Johns made application to the council of the Seneca nation on the 25th December, 1879, for renewal of his lease which was granted and lease made of that date, and on 20th day of January, 1880, the plaintiff made a like application for renewal of her lease, which was granted by the councilors, and lease made of date of May 8, 1880, which included the land in lease to defendant. In action of ejectment by plaintiff, to recover the land held by defendant:

Held, first, that plaintiff had made improvements on the land covered by her lease, and within the meaning of the act of congress was the owner of them, and therefore entitled to a renewal of her lease.

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Second. That the leases to the plaintiff and defendant Johns were in the strict legal sense invalid prior to the act of congress of 1875, and that they had no legal rights in respect to the leased premises, except that afforded by possession, but that act confirmed and made leases then outstanding valid, and established rights under them as effectually as of the time of their execution as if they had been made by persons competent to vest the rights they purported to give. In that view the plaintiff became the lessee of the entire premises covered by her lease by the force of the act from the time it was made, and that to the defendant Johns was ineffectual to vest in him any right to the land embraced in it.

Third. That the plaintiff was entitled to renewal of her lease entire, and the continued possession of the premises covered by it, and the defendant Johns had in fact no existing lease, and no right to any renewal in respect to the premises in question, unless the plaintiff had relinquished them to him in such sense that he might be treated as in possession as her lessee or assignee.

Fourth. That the provision in the act of congress for renewal of leases to persons who own improvements, has reference to those only who at the time the application is made, lawfully claim under a lease, or under some one who has taken a lease which is then valid, and does not include one who has unlawfully as against such leaseholder (entitled to renewal), entered and made improvements upon some portion of the premises.

Fifth. That it is conclusively established by adjudication that the defendant Johns derived no right to possession of the premises from the plaintiff, and he had no position which enabled or permitted him as against the plaintiff to apply for or take the renewal lease under which he claims, but the right was exclusively in the plaintiff to have a renewal lease covering the entire premises embraced within that first taken by her.

Sixth. That as it was the custom, and had been for years, of the council of the Seneca nation to assemble for the transaction of its business, and the action of the council when so assembled was governed by rules and by-laws, and a formal record of the proceedings was kept in a book by the clerk, a copy of such record certified by him is competent evidence.

Fifth Department, General Term, April, 1885.

Before HAIGHT and BRADLEY, JJ.

APPEAL from a judgment, entered in favor of plaintiff, on verdict of Cattaraugus circuit, and from order denying new trial.

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Ansley & Davie, for appellants.

Henderson & Wentworth, for respondent.

BRADLEY, J. — The action is ejectment, to recover the possession of land which is part of the Allegany Indian reservation and situated in the village of Salamanca, county of Cattaraugus.

On the 26th day of May, 1871, George Jemison, a Seneca Indian residing on the reservation, made to the plaintiff a lease of certain premises (of which those in question are a part) for the term of twelve years. And on the 16th day of June, 1874, the same Jemison, executed and delivered to the defendant Johns a lease of the land in question, and the defendant Netz is his tenant, and in possession. The plaintiff had a verdict and judgment from which and from order denying new trial this appeal is taken.

By act of congress of February 19, 1875, entitled "an act to authorize the Seneca nation of New York Indians to lease lands within the Cattaraugus and Allegany reservations and to confirm existing leases," it was provided that the president of the United States appoint three commissioners to survey, locate and establish proper boundaries of the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, on the Allegany reservation, make maps thereof and designate on the maps defined as near as may be the lands therein then leased, and to deposit the surveys and maps in the clerk's office of that county for record and preservation. That the then existing leases within those boundaries should be valid and binding for the term of five years thereafter, unless by the terms thereof they expired before that time. And at the end of that time and on the expiration of term of leases before then, the Seneca nation should be entitled to the possession of the lands so leased.

But it was further provided that the leases should at expiration of the term or of that time be renewable for a period

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not exceeding twelve years, and that the persons who may be at such time the owner or owners of improvements erected on such lands shall be entitled to such renewed leases, and continue in possession on such conditions as may be agreed upon by them and the councilors of the nation. And if they could not agree, the terms to be fixed by referees selected in a manner prescribed by the act (18 *U. S. Statutes at Large*, 330).

The surveys and maps were made, filed and recorded pursuant to that act of congress.

The defendant made application to the council of the Seneca nation on the 25th day of December, 1879, for renewal of the lease before mentioned to him which was granted and lease made of that date. And on 20th day of January, 1880, the plaintiff made a like application for renewal of her lease which was granted by the councilors, at a meeting on the 8th day of May, 1880, and lease of that date made to her, which included the land in the lease to the defendant.

The plaintiff had made improvements on the land covered by her lease and within the meaning of the act of congress was the owner of them, and therefore entitled to a renewal of her lease. The only question is whether she had the right to include within her renewed lease that portion of the land in question.

The defendant Johns claims that he had made and owned improvements on it, and that he was within the act entitling him to renewal of his lease. There is evidence tending to prove that he made improvements on this land in April, 1879; that there was a house on it which was built there in 1873, which he bought of one Nelson in 1874, who had purchased it on a mechanic's lien sale shortly before; that the plaintiff was advised of the purchase by Nelson, and of his purpose to sell it to defendant Johns and made no objection but said that it belonged to her brother and she had no claim on it and it appears that her brother with her permission built the house and lived in it for a short time and left it, and that the plain-

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tiff improved and cultivated the land in question until the defendant Johns took possession without her consent in 1879. As between persons competent to contract, the one prior in time of two stipulations, to the same effect would give the superior right. And such rule should be applied here unless the anomalous situation before the act of congress and the effect of its provisions since do not permit the application of such rule. For many years prior to that act the Seneca nation had a system of allotment of lands to respective Indians, for occupation, cultivation and improvement, and in aid of such purpose there was some legislation of this state (*Laws of 1845, chap. 150, sec. 6; Laws of 1849, chap. 378*) pursuant to which individual occupancy was observed. And it was also common for those occupants or those so entitled to occupy to make leases. But our attention is not called to any law which gave legality to any leases to white persons, prior to the act of congress before referred to, except so far as relates to police regulations and to preserve the peace and to prevent intrusion upon the reservation, the legislative power in respect to the tribe and the lands occupied by them is exclusively in congress. And the relation of the Indians is that in the nature of ward of the general government. It, therefore, may be assumed that the leases to the plaintiff and defendant Johns were in the strict legal sense invalid prior to the act of congress of 1875. And that they had no legal right in respect to the leased premises except that afforded by possession, but that act confirmed and made leases then outstanding valid, and established rights under them as effectually as of the time of their execution as if they had been made by persons competent to vest the rights they purported to give. In that view the plaintiff became lessee of the entire premises covered by her lease by the force of the act from the time it was made, and that to the defendant Johns was ineffectual to vest in him any right to the land embraced in it. Then comes the effect of the act in respect to the right to have renewal. That necessarily related to an existing lease and one under which

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rights were vested by virtue of it in view of the confirming act, and limited such right to those lessees who were the owners of improvements erected on the lands covered by their leases respectively. And except so far as the lessee had relinquished to another the right to renewal of the lease, is not qualified so as to permit the reduction or severance of the premises covered by it.

While the act in terms does not distinguish between conflicting leases nor declare a preference of those of the earlier dates, in such case it must be assumed that the purpose of the statute was that the rights of the lessees and their assigns, such as the law would recognize in respect to priority should be observed and such is the fair and proper construction and effect of the act and the equitable rule to be applied (*Ryan agt. Knorr*, 19 *Hun*, 540). If this proposition is correct it follows that the plaintiff was entitled to renewal of her lease entire, and the continued possession of the premises covered by it, and the defendant Johns had in fact no existing lease and no right to any renewal in respect to the premises in question, unless the plaintiff had relinquished them to him in such sense that he might be treated as in possession as her lessee or assignee.

The evidence does not permit the conclusion of any such relation between them. There is nothing appearing in connection with the circumstances of his purchase of the house on her part which can be construed as a surrender of the possession of the premises in question to him. And as between those parties the defendant had no right to the possession. The provision in the act of congress for renewal of leases to persons who own improvements has reference to those only who at the time the application is made, lawfully claim under a lease or under some one who has taken a lease which is then valid, and does not include one who has unlawfully as against such lease holder (entitled to renewal) entered and made improvements upon some portion of the premises. It appears that the plaintiff resisted the interference by the

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defendant Johns with her possession and enjoyment of the premises which he claims, that in June, 1876, she prosecuted him by action for trespass committed on them in the years 1872, 1873 and 1874, in the county court, and a trial was had and she recovered.

And that about the 1st of May, 1879, she commenced an action in this court against him to recover the possession of the same premises, which he defended, and at the trial (May 24, 1880) it appearing that the plaintiff's title on which the action was based at the time of its commencement had expired on 19th February, 1880, a verdict was rendered for the plaintiff for damages for the wrongful detention from her of the premises by the defendant, upon which judgment was entered against the defendant, with costs, pursuant to the statute in such case (2 R. S., 308, sec. 31; *Lang agt. Wilbrahane*, 2 Duer, 171; *Van Rensselaer agt. Owen*, 48 Barb., 61). This recovery is conclusive evidence as to the title of the plaintiff as against the defendant Johns up to the 19th day of February, 1880, and has no greater or other force or effect beyond that action between them as an adjudication (2 R. S., 309, sec. 36; *Beebe agt. Elliott*, 4 Barb., 457; *Briggs agt. Wells*, 12 Barb., 567; *Cagger agt. Lansing*, 64 N. Y., 417; *Dawley agt. Brown*, 79 N. Y., 890). And this conclusive effect is wholly given by the statute (*Bates agt. Stearns*, 23 Wend., 482).

Thus is conclusively established by adjudication that the defendant Johns derived no right to the possession of the premises from the plaintiff. And if we are right in the views above given he had no position which enabled or permitted him as against the plaintiff to apply for or take the renewal lease under which he claims, but the right was exclusively in the plaintiff to have a renewed lease covering the entire premises embraced within that first taken by her.

The contention of the defendant's counsel that the evidence presented a question of fact in respect to the action of the council on the plaintiff's application for the renewal of her

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lease and therefore the direction of the verdict was error, is not, we think, supported. It was the custom, and had been for many years, of the council of the Seneca nation to assemble for the transaction of its business.

The action of the councilors when so assembled was governed by rules and by-laws, and a formal record of the proceedings was kept in a book by the clerk. And a copy of them certified by him are competent evidence (*Laws of 1847, chap. 365, sec. 7*).

It is not necessary to hold that the original record or a copy certified by the clerk is conclusive evidence that they were correctly entered in the book.

They would not be such in a direct proceeding within a proper time to attack directly action based upon them. But in a collateral action or proceeding to which the nation is not a party and which involves inquiry into the validity of the execution of a contract made pursuant to the record of the proceedings as entered to which the nation is a party, and executed by the council by its president according to its established rules and custom, it is very questionable whether their proceedings as they appear on the record, and the execution of such contract in fact so made can be attacked in that manner. But here the plaintiff was entitled to the renewal which she received. The only question open to the council of the Seneca nation was that of terms. The nation do not complain of them and the defendant cannot. And the terms are in all respects those appearing in the record of the proceedings of the council.

If the propositions we have adopted as applicable to this case are correct it follows that no error was committed by the trial court, and that the judgment and order should be affirmed.

HAIGHT, J., concurred; BARKER, J., not sitting.

The People *ex rel.* Cass *et al.* agt. Hosmer *et al.*

SUPREME COURT.

THE PEOPLE *ex rel.* CASS *et al.* agt. HOSMER *et al.* inspectors of election of the thirty-fourth election district in the twenty-third assembly district; and twenty-seven other cases against the same inspectors.

Election law — Registration of voters — Duties of board of registration — No right to refuse to register all duly qualified voters who may have made application for registration within the time prescribed by law.

Under the act relating to the registration of voters in the city and county of New York, it is the duty of the inspectors to register every duly qualified voter who presents himself within the place of registration before the hour of nine o'clock in the evening and demands to be sworn, and the true construction of the statute is that the place of registration shall be closed at that hour, but not that the inspectors shall refuse after that hour to register those who have applied within the time prescribed by law.

New York Chambers, October, 1885.

LAWRENCE, J.—The relators show that they are citizens of the state of New York, of full age, and have resided in the state more than one year, four months in the county and thirty days in the election district, and that they are duly qualified and entitled by virtue of such citizenship and residence to appear and be registered as voters at the next general election; that on the 24th of October, inst., they each appeared before said inspectors for said thirty-fourth election district, some of them as early as 7.45 o'clock P. M., and all of them before the hour of nine o'clock, P. M., for the purpose of being sworn and examined as to their qualifications as voters and for the purpose of being registered as required by law. It also appears from the affidavits that each of the relators remained continually in the place of registration from the time of his entry therein up to nine o'clock P. M., and that each demanded that the said board of inspectors should register his name, and requested to be sworn by them, but that the said board of inspectors declared

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the registry closed at nine P. M. and refused to enter the relators' names on the registry, &c. The act relating to the registration of voters in the city and county of New York (*chap. 24 of chap. 410 of the Consolidation act of 1882, as amended April 21, 1883*), provides (*sec. 1858*) that the inspectors of election appointed pursuant to the provisions of this chapter, shall at the times in this chapter designated for a general registration, meet in their respective election districts, at the places which, as provided in this chapter, shall be designated therein for such meetings, and at such times in each election district the said inspectors of election shall openly and publicly do and perform the following acts, viz.:

1. They shall organize as a board by selecting one of their number to act as chairman; but in the case of failure to so organize within fifteen minutes after the time fixed for the meeting, the chairman shall be selected by lot.
2. They shall receive the application for registration of such male residents of their several election districts as then are, or on the day of election next following the day of making such applications would be, entitled to vote therein, and who shall personally present themselves, and such only.
3. They shall remain in session on each of said days between the hours of eight o'clock in the morning and nine o'clock in the evening, and shall administer to all persons who personally apply to register the following oath of affirmation, viz.: "You do solemnly swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence, name, place of birth, your qualifications as an elector and your right as such to register and vote under the laws of this state."

The next subdivision of this section relates to the entries to be made in the registry, and it is not necessary to set it forth at length. The question in these cases is whether the books of registry are to be closed at nine o'clock in the evening, although duly qualified voters are within the place of registration demanding to be sworn as to their qualifications as voters, or whether it is the duty of the inspectors to register

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all such voters as may have made application for registration, and are within the place of registration at the hour of nine in the evening. I am of the opinion that it is the duty of the inspectors to register every duly qualified voter who presents himself within the place of registration before the hour of nine o'clock in the evening and demands to be sworn, and that the true construction of the statute is that the place of registration shall be closed at that hour, but not that the inspectors shall refuse after that hour to register those who have applied within the time prescribed by law. The object of the registry law is to enable it to be ascertained who are duly qualified voters. The electors are required to present themselves within certain hours for the purpose of having their qualifications ascertained in each of these cases. The affidavits show that the relators personally presented themselves for registration before the hour for closing the place of registry had arrived. Surely they should not be deprived of their right to vote when they have done everything which the law required them to do, for the purpose of proving their qualifications as electors. I am strengthened in this conclusion when I compare the phraseology of section 1843 of the act with that of section 1858. Section 1843 provides "that at all elections hereafter held in the city and county of New York, the polls shall be opened at six o'clock in the morning and closed at four o'clock in the afternoon." The language of subdivision 3 of section 1858 is that the inspectors "shall remain in session on each of said days, between the hours of eight o'clock in the morning and nine o'clock in the evening, and shall administer to all persons who personally apply to register the following oath," &c. There is no positive provision that the inspectors shall close their books at nine o'clock in the evening if there are persons waiting to be registered who are duly qualified as voters and who have appeared before them before nine o'clock. In section 1843 the mandate is that "the polls shall be closed at four o'clock." The language of section 1858 is not mandatory as to the closing of the

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books, and there is nothing in it from which it can be inferred that the books are to be closed and thereby duly qualified electors deprived of their registration, although they have done everything within their power to obtain such registration, and are personally present before the inspectors when the hour of nine in the evening arrives. The affidavit presented on behalf of the relator Mr. Sherwood is defective, inasmuch as it is simply corroborative of the affidavit of Cass, and does not show that Sherwood made the same demand in his own behalf as Cass made. The intention undoubtedly was to adopt the affidavit of Cass, and to allege that the same facts existed in the case of Sherwood; but the affidavit does not state so. In all the other cases I shall direct that peremptory writs issue, but until a further affidavit is presented on behalf of Mr. Sherwood his motion must be denied.

SUPREME COURT.

GEORGE E. DODGE, respondent, agt. JOHN S. COLBY, appellant.

Complaint—Demurrer—Code Civil of Procedure, section 484—Slander of title—What must be alleged to maintain—Jurisdiction—Courts of this state no jurisdiction for trespass to lands without the state—Trespass and slander of title cannot be joined.

The courts of this state have no jurisdiction for trespass to lands without the state.

To maintain slander of title, it must be alleged to have been malicious. It is no slander to allege ownership and that plaintiff has no title.

Under section 484 of the Code of Civil Procedure, trespass and slander of title cannot be joined in the same complaint.

First Department, General Term, October, 1885.

Before BRADY, P. J., and DANIELS, J.

APPEAL from an interlocutory judgment overruling a demurrer to the plaintiff's complaint.

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Stephen B. Brague, for appellant.

John E. Parsons, for respondent.

DANIELS, J. — The plaintiff has brought this action as the owner of about 300,000 acres of land, situated in the state of Georgia, to recover damages for timber and turpentine taken from the land, and a'so for the slander of his title by the defendant. The complaint contains two causes of action for the timber and turpentine. To present the first of these causes of action it has been alleged that the defendant and others acting with him "have caused various persons to cut timber and to take turpentine, the property of the plaintiff, from the same." The second cause of action has been similarly stated. For that purpose it has been alleged that the defendant and others for whom he was acting, represented to lawless and irresponsible persons that they would protect such persons "in trespassing upon said lands and removing turpentine and timber, the property of the plaintiff, from the same." And that various persons "thus encouraged and protected by the defendant and his said agents, and relying upon their assurance and protection, and directly instigated by them, have taken turpentine and timber from the said lands, the property of the plaintiff, of great value." By these allegations the facts upon which the plaintiff's right to recover has been made to depend, were trespasses upon real estate situated in the state of Georgia, and for such trespasses no action can be maintained in the courts of this state (*Oragin agt. Lovell*, 88 N. Y., 258).

An effort has been made to distinguish this case from that authority, upon the fact that the plaintiff in this action claims to recover the value of the timber and turpentine as so much property belonging to him, which has been converted by the persons who removed it from the land, under the authority or at the instigation of the defendant. But the removal of the timber and turpentine and its appropriation to the use of the persons taking it, will not entitle the plaintiff to maintain

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this action in this state, for the conversion and appropriation were merely acts by which the trespass itself was made complete, and its fruits diverted to the use of the persons committing these wrongs upon the land.

A similar proposition was presented in *American Union Telegraph Company agt. Middleton* (80 N. Y., 408), but it failed to receive the sanction of the court. And it was held that the acts of trespass themselves could not be separated from those of the removal and appropriation of the property in such a manner as to allow an action to be maintained for the value of the property actually converted. The case is directly applicable in this respect to the one now under consideration, and although it may conflict in this conclusion with the decisions cited from the reports of the state of Pennsylvania, it must still be held to be controlling as to its disposition.

It has been urged that a different conclusion was arrived at in *Newman agt. Godard* (3 Hun, 70), but that is a mistaken view of that case, for the property for which it was held a recovery might there be had was no part of the freehold, but it was personal property, in no manner whatever connected with the premises from which it was taken. This case cannot be brought within the principle upon which that proceeded, but it is to be controlled by the authorities previously mentioned. Neither of these subdivisions present a cause of action within the jurisdiction of this court, and that part of the demurrer by which this point has been raised was therefore well taken.

The residue of the complaint containing what has been relied upon as a third cause of action consists in brief of the charge that the defendant and others acting under his authority had both publicly and privately denied the plaintiff's title to this land. But in no part of the complaint relating to this cause of action has it been alleged that this denial of the plaintiff's title was maliciously made, and that is an essential fact the existence of which has been required to sustain an action for the slander of a title (*Like agt. McKinstry*, 41 Barb., 186).

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But it appears further from the allegations contained in this subdivision of the complaint that the defendant and those acting with him claimed an adverse title to the property to the plaintiff, and stated that they had been confirmed in the propriety of that claim by the unanimous decision of four able legal gentlemen who had investigated the subject, and concluded that the plaintiff was not the owner of the land. It is entirely manifest from the alleged statements contained in the complaint that the defendant claimed to be interested as owner in this property. And where a claim may be made of that description, together with the assertion that the plaintiff is not the owner of the property, an action of slander cannot be maintained for the mere making of the assertion (*Smith agt. Spooner*, 3 *Taunton*, 246). And this case, as well as the preceding authority, proceeded further upon the principle that the words by which the title in question may have been assailed, must be shown to have been spoken maliciously. Indeed that is essential in all actions of slander, and before such proof can regularly be given the complaint itself must contain an allegation that such was the fact. In no part of this complaint, therefore, was any cause of action disclosed against the defendant.

But if it should be held that each division of the complaint contained a cause of action, then it was subject to the further objection mentioned in the demurrer, that the causes of action were improperly joined. For by section 484 of the Code of Civil Procedure, an action of slander cannot be joined with an action for injuries to real property or for injuries to personal property; but the causes of action which may be regularly united in the same complaint must belong to one of the subdivisions contained in that section.

The judgment overruling the demurrer was erroneous, and it should be reversed and judgment ordered for the defendant upon the demurrer, with leave to the plaintiff to amend within the usual time on the payment of costs.

People *ex rel* President, &c., of D. and H. Canal Co. agt. Keator.

SUPREME COURT.

THE PEOPLE *ex rel*. THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY agt. ABRAM P. KEATOR, CONRAD SCHINNEN AND JAMES RODDEN, as assessors of the town of Rosendale in the county of Ulster.

Taxation of railroads or canals—Evidence of value.

The assessors in estimating the value of railroad or canal property, within a town, are not to be governed solely by its cost, but rather, though not exclusively, by its productiveness for railroad or canal purposes.

The taxable value of the part of a canal which lies within a town in which the tax is laid, is to be ascertained by valuing, as a part of a whole a continuous way to carry freight from one point to another, and the profits of its use for that purpose (*See ante*, 454).

Ulster Special Term, July, 1885.

CERTIORARI to review assessments.

P. & C. F. Cantine, for relators.

A. T. Clearwater, for respondents.

WESTBROOK, J. — The relator, by *certiorari*, seeks to have its assessments in the town of Rosendale, Ulster county, New York, during the years 1882 and 1883, reviewed and corrected.

It is the valuation of its canal within the limits of that town of which the relator complains; such valuation, including its telegraph line, being \$268,000 in 1882, and \$292,000 in 1883.

The canal extends from Eddyville in the county of Ulster and state of New York, to Honesdale in the state of Pennsylvania, and is 108 miles in length, five and one-half of which are within said town of Rosendale. The valuation, therefore, of the canal per mile in the town was \$48,727.26 in 1882 and \$49,454 in 1883. The only point to be discussed is the valuation of the canal. The valuation of the real estate of other parties than the relator and the Wallkill Valley railway in such town was examined by the judge writing this opinion

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upon the *certiorari* prosecuted by such railway, and such valuation was found to be forty per cent only of its actual value. That conclusion was recently sustained at general term, and need not now be discussed. The evidence of valuation given upon these proceedings is the same as was given upon the *certiorari* in the other, except that the appraisers who valued the property of the town upon a recent appeal to the state assessors were examined, and such evidence will be found fully to justify the conclusion as to value in the other proceeding.

Neither will it be necessary at this time to discuss at any length the value of the canal per mile. That question has also been recently examined in the *certiorari* brought by the present relator to review the assessments in the town of Marbletown during the same years. The conclusion reached in that proceeding was that the actual value of the canal per mile, estimated as the statute directs the assessors to do, "at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor" (2 R. S. [7th ed.], 992, sec. 17), was not greater than \$16,000 per mile. The reasons for reaching that conclusion are contained in the other opinion and to that reference is made.

In view of the elaborate argument, however, of the counsel for the respondents it is proper to say a few words in addition to the opinion in the other case. The statute to which reference has been made directs the valuation to be estimated not upon its cost nor upon its value to the relator, but upon the transfer of the property to a creditor in the payment of a debt. No creditor would receive it for any other purpose than as an investment, and in receiving it he would calculate its earning capacity. The canal is undoubtedly of greater value to the relator than it would be to any other person. It is still used as the way to transport its own coal from its mines in Pennsylvania to tide water upon the Hudson. For this purpose it was built, and has ever since been operated. Its tolls are very much less than its operating and maintaining expenses, the latter being more than three times as great as

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the former. This canal, however, in addition pays something to the relator as an outlet for its own production. If, however, it was parted with to another, the use which the relator makes of it would have very little effect. If the buyer had no coal to transport, when he ascertained that the cost of maintenance and operation was three times as great as any receipts he could expect, what would he give? And if he had coal to transport, what would he give for this old and almost obsolete way? The relator, of course, cannot afford to throw away its canal and build a railroad. It would then sink the capital invested in the canal, and invest additional capital in a new mode of transportation. Not only would it sink the capital invested in the canal, but all the money invested in its boats, machinery and appliances, adapted to its navigation, and pay out very large sums for a railroad, cars, appliances and machinery therewith to do its business. In short the abandonment of its canal by the relator is throwing away its money invested in the structure and the machinery, boats, &c., required for its business, and the expenditure of a very large sum for a new avenue and means of transportation. The creditor buying would, however, have a different problem before him. He has money to invest, and he would have a choice between an investment in a canal, which would involve also a large additional sum for boats, machinery and appliances adapted for the canal, and a railroad. Necessarily he would consider the question from a different standpoint than the relator, for the selection of either involves no sinking and throwing away of capital already invested. The question is, what would such a person give for the canal per mile? It is difficult to say, it is true, but it certainly would be unsafe to say that he would give a greater sum per mile than individuals of the experience, character and standing of the late Mr. Dickson, and Mr. Young, estimate it to be worth — from \$5,000 to \$8,000 per mile. When its value is put, as it was in the Marbletown case, and as it will be in this, at \$16,000 per mile, a sum twice as great as the persons referred to and

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best knowing its value by their highest figures place it, it is believed that the other taxpayers of the town should be more than satisfied. Neither does the fact that the late Mr. Dickson, Mr. Young, and others did or do now sustain official relations to the relator, detract from their evidence. They were or are men who grew up on the canal, having passed through all its grades of employment from boatmen up, and their years of faithful service enabled them, not only to speak as experts, but also with the weight of character which honorable conduct gives.

It has already been said that the other property in the town was valued at forty per cent of its actual value. Do the respondents claim that the same rule was applied to that of the relator? The law, justice, and official oaths demand that they should have done so. The valuation of the canal per mile during the two years averages \$49,090. If that be forty per cent of its actual value, then we have the astonishing result, that the respondents found the actual value of the canal about \$122,000 per mile. Upon this fact comment is unnecessary.

To equalize the taxation of the relator with others in the town, its canal should be appraised at a sum per mile, which forty per cent of \$16,000 would produce.

With some doubt as to its correctness no costs will be imposed upon the respondents. Their conduct in deliberately valuing other property in the town at only forty per cent of its value, after their attention had been drawn to the error by the opinion in the *Wallkill Valley Railway Case* has not been overlooked. It was, however, the opinion of a single judge, and perhaps good faith in their action should be imputed. There are some things to which attention has been called now and some which were commented upon in the other proceeding against them by the railway, which are worthy of attention on the question of good faith. Believing, however, that wrong practice for years in their town has misled the respondents, no costs will be imposed.

People *ex rel.* Cole agt. Board of Supervisors of Greene County.

SUPREME COURT.

THE PEOPLE *ex rel.* EDWARD M. COLE agt. THE BOARD OF SUPERVISORS OF GREENE COUNTY.

Courts — Contingent expenses — Power of court to order publication of terms — Duty of county treasurer as to payment — Mandamus

Courts must determine what is a legal and proper expense and charge to be paid by a county treasurer in regard to the holding of such courts.

There are contingent expenses necessarily incurred in the holding of courts for which no express statute provides, and the board of supervisors of a county must provide a fund, to be placed in the hands of its county treasurer, "to pay such contingent expenses as may become payable from time to time," and a court held in such county must determine what is a proper and lawful charge upon such fund.

Where the relator, in pursuance of an order made by the court, published in his newspaper the terms of the various courts appointed to be held in Greene county, and the clerk, in pursuance of said order, issued a certificate for the amount of the bill for performing the service ordered, payable out of the fund provided for the contingent expenses of the court:

Held, that the order for its payment should be obeyed by the county treasurer, and is enforceable against him by *mandamus*.

It is not the prerogative of a board of supervisors nor of a county treasurer to adjudge an order of the court void and incapable of enforcement.

Where a bill for publishing the terms of the court (such publication having been done under an order of the court) was presented to the board of supervisors of the county of Greene for audit, and on the rejection of such bill upon the ground that the same was not a legal charge against the county, the relator asked that a *mandamus* to compel its audit might issue:

Held, that although the order made by this court should have been obeyed by the county treasurer, and obedience thereto is enforceable against him, a *mandamus* against the board of supervisors will not be granted.

Greene Special Term, December, 1884.

MOTION by the relator for a *mandamus* commanding the respondent to audit and allow a bill for printing and publishing in his newspaper the terms of courts in the third judicial district, pursuant to an order of this court.

People *ex rel.* Cole agt. Board of Supervisors of Greene County.

E. A. Chase, for relator.

Sidney Crowell and *J. B. Olney*, for respondent.

WESTBROOK, *J.*—The relator has, in compliance with an order of this court dated November 5, 1878, published in a newspaper owned and controlled by him and printed in the county of Greene, the terms of the supreme court, circuit court and court of oyer and terminer appointed to be held in the third judicial district of this state, of which the county of Greene forms a part, during the time of such publication. His bill was presented to the board of supervisors of the county of Greene for audit, and on the rejection of such bill, upon the ground that the same was not a legal charge against the county, the relator asks that a *mandamus* to compel its audit may issue.

It should be further stated that the order required the clerk of the court to issue a certificate for the amount of the bill for performing the service ordered, payable out of the fund provided for the contingent expenses of the court.

The application presents two questions, viz.: (1st.) Was the order one within the power of the court; and (2d.) Has the relator chosen the proper remedy?

In the discussion of the first question it will be assumed, for the point is too clear to admit of discussion, that the holding of courts in a county must oftentimes involve expenses for which statutes make no provision. If proof of this assertion is needed, it will be found in the many orders made during a session of the court for payments which no express enactment warrants and the justice and legality of which no one will question. Such expenses are properly covered by the term "contingent expenses," which, when "necessarily incurred for the use and benefit of a county, are a county charge" (2 *R. S.* [7th ed.], 979, *sub.* 15, *sec.* 2); and to enable "their respective county treasurers to pay such contingent expenses as may become payable from time to time, the board of supervisors of the several counties shall annually cause

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such sum to be raised in advance in their respective counties, as they shall deem necessary for that purpose" (*Same vol. and page of R. S., sec. 5*).

As, then, there are contingent expenses necessarily incurred in the holding of courts for which no express statute provides, and as the board of supervisors of a county must provide a fund to be placed in the hands of its county treasurer, "to pay such contingent expenses as may become payable from time to time," it necessarily follows that a court held in a county must determine what is a proper and lawful charge upon such fund. Either this conclusion must be adopted, or else the position must be assumed that the county treasurer is to pass upon the validity of every court order directing a payment from the contingent fund. The statute contemplates a payment by the county treasurer "in advance" of an audit by the supervisors, and hence it follows that the assertion just made is correct, that either the court or the county treasurer must determine what is a legal expense against the county and a valid charge upon its contingent fund. It is not difficult to determine as between the two, the court and the county treasurer, where the authority to decide is and should be lodged. The thought is not to be entertained that the legislative intent was that the means necessary to conduct the machinery of courts should be under the control of any body or officer other than those who are charged with the official duty of controlling its action and directing its energy. It is true that the power of a court may be abused, but reasoning against the existence of a power based upon its liability to abuse is as effectual against any other body in which it may be supposed to reside as it is in regard to courts; and as a fact it will be found that courts are as economical in the expenditure of money as boards of supervisors, and their judgment as to legality, need and propriety of an expenditure made in connection with the holding of courts in a county, as safe and as wise as that of supervisors or county treasurers.

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Having reached the conclusion that courts must determine what is a legal and proper expense and charge to be paid by the county treasurer in regard to the holding of such courts, it follows that the order made by the court in favor of the relator should be obeyed by the county treasurer. Neither the propriety nor the need of the order can be now considered. Both were determined when such order was made; and this court, though held by another judge, will not sit in judgment upon an order duly entered when presided over by one of his associates. To do so would be to confer upon every county treasurer the power to block the machinery of a court by refusing to obey an order as to the disposition of a fund in his hands, placed there to keep such machinery in motion, until the same court held by another judge again passed upon its propriety and legality. If, however, the discretion of the judge who made the order is in this way reviewable, it is due to him to say that there are no facts shown to justify the inference of an abuse of power. The advertisement of the terms of the courts directed by the order was, it seems to me, a wise and proper act. It is important that the people of a county should be informed as to the sittings of courts in their midst, and the very small expenditure incurred for that purpose is scarcely equal to the sum which the county will pay for the increased per diem allowance to its representatives while they have considered the propriety and legality of the charge. This statement is made without any intent to criticise the action of the board of supervisors, or to question its good faith, but only for the purpose of forcibly presenting the comparatively small expenditure which is resisted.

While entertaining no doubt that the order made by this court should have been obeyed by the county treasurer, and that obedience thereto is enforceable against him, it is not seen, however, on what ground the *mandamus* asked against the board of supervisors can be granted. Its members have disobeyed no order of this court; on the contrary, the order sought to be enforced is upon and against a fund in other

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hands, and against and to another official. While, however, the present motion must for the reason just stated be refused, such denial will be without costs, and without prejudice to the right of the relator to move for a *mandamus* against the county treasurer. It is evident that the legality of the order of November 5, 1878, has been the subject of controversy, and not the liability of the body against which this proceeding is taken. Indeed, it was stated upon the argument that in refusing to obey the order the county treasurer acted by direction of the board of supervisors. As the court thinks that the action of the county treasurer in refusing to obey the order was unjustifiable, and that of the supervisors in upholding him in such refusal equally erroneous, it cannot award costs against a party who has a real grievance to redress, because he has taken his legal remedy against a party who is morally but not legally responsible for the facts which make a proceeding in a court a necessity.

Perhaps it ought to be said, in conclusion, that if at any time an order for payment of a bill out of the fund provided for the contingent expenses of courts is unwise or improvident, any judge to whose attention it is called will cheerfully correct or revoke it, but it is not the prerogative of a board of supervisors nor of a county treasurer to adjudge an order of this court void and incapable of enforcement.

Eberle agt. Kauffeld.

CITY COURT OF NEW YORK.

MARY EBERLE agt. JOHN KAUFFELD, treasurer of the Abraham Lincoln Conclave No. 8 of the Free Order of the Seven Wise Men.

Benevolent society — Action for benefits — What must be alleged and proved.

The provisions of the constitution and by-laws of a benevolent society providing for the payment of sick or death benefits are in the nature of a contract, and the plaintiff must allege and prove a breach of said provisions before he can maintain an action. The question whether the action should be brought against the subordinate or grand lodge, considered.

Trial term, November, 1885

TRIAL by the court without a jury.

William E. Iliff, for plaintiff.

M. E. Goodhard, for defendant.

McADAM, C. J. — The defendant is an unincorporated benevolent association, consisting of more than seven members, and it is sued according to the statute, in the name of its treasurer, by the plaintiff, the widow of Peter Eberle, who died while a member of the order. The action is to recover \$500, which the widow claims she is entitled to receive under the constitution and by-laws of the association. It has been stipulated that, if entitled to recover, the plaintiff shall have judgment for \$250, so that the question of damages is no longer an issue in the case, and the contention is narrowed down to the right of the plaintiff to maintain the action against the defendant. Two objections are urged to a recovery.

First. It is said that the plaintiff's husband was not a member in good standing in the order at the time of his death, because on the 22d day of April, 1885, the said Peter

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Eberle was in arrears to his lodge in the sum of four dollars and sixty-five cents, and that for such default the said Peter Eberle was on the evening of that day suspended from the association. But section 14 of the by-laws, authorizing the suspension of members, only applies to those who have been in arrears for four months; and there is no proof that Eberle was in arrears for this length of time, so that the suspension was unauthorized, and in consequence illegal and inoperative.

Second. That the remedy of the plaintiff is against the "grand conclave" and not against the defendant, which is merely a subordinate lodge, not charged with the duty of levying assessments to pay death benefits, nor with the duty of paying them when the assessments levied for the purpose have been collected.

It appears that by the scheme of the order subordinate lodges are called "conclaves," and the grand lodge or central body the "grand conclave." The constitution and by-laws to which Eberle subscribed and by which he is bound, provide the following system of levying and paying death benefits:

"Article sixth. The grand conclave makes the assessment in all cases of death; the subordinate conclave collects the assessment from its own members after notice of the death of a member."

"Article seventh. The constitution of the grand conclave governs each subordinate conclave, and each subordinate conclave pays to the grand conclave the sum of fifty cents for each and every member on its roll, and when collected by the grand conclave a committee of five members pay it over to the widow."

By these provisions it will be observed that the "grand conclave" makes the assessments in case of death, and each subordinate lodge after notice so to do collects assessments from its own members at the rate of fifty cents for each member on its roll, and that after the assessments are levied and collected by the grand conclave a committee of five members selected by the grand conclave pay the death benefits

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thus collected over to the widow. It is neither alleged nor proved that the "grand conclave" levied any assessments in this instance or that it has collected any funds for death benefits from the subordinate conclaves, or that it has paid over to the defendant or to any committee appointed by it any moneys with directions to pay the same to the widow, nor is it alleged or proved that the defendant, as a subordinate lodge, failed to perform any duty owing to the plaintiff in this respect. Under the circumstances no cause of action has been established against the defendant. The constitution and by-laws of an unincorporated association providing for sick or death benefits is in the nature of a contract, and a recovery thereon can only be had by alleging and proving a breach of its terms by the party against whom the recovery is sought.

The mode of collecting death benefits in this order may be circuitous, but it is made so by the provisions to which Eberle on becoming a member assented. They apply alike to all similarly situated, and are binding on all who assented to them. It does not follow that the plaintiff is remediless. Her remedy is to require the grand and subordinate conclaves to perform their duty in the premises, and if they refuse to do so an action for breach of duty will no doubt lie.

The complaint must be dismissed, with costs, and without prejudice to a new action on a proper complaint charging the grand or subordinate conclave with breach of the duty imposed upon them by the constitution and by-laws of their order.

Bigart agt. Jones.

SUPREME COURT.

WILLIAM BIGART, as executor of the last will and testament of **THOMAS HOPKINS**, deceased, agt. **FREDERICK C. A. JONES**, as administrator, &c., of **CECILIA JONES**, deceased, and others.

Will — Construction of — Practice — Executors — Action.

Where a will presents upon its face questions of complication, uncertainty and difficulty, an executor may institute and maintain an action for the purpose of obtaining a judicial construction thereof, and for direction to him as to the manner in which he should discharge his duties in executing the will as such executor.

It is the policy of the law, in regard to the construction of wills, to give effect to every part thereof, to the end that every beneficiary shall receive the bounty of the testator, according to his intention, as fairly gathered from the entire instrument.

Where the testator by his will bequeathed, after the payment of debts and funeral charges, all of his personal and real estate, except a lot which Elizabeth Akin was to occupy, to his wife, to be used and enjoyed by her during her natural life, or until she should marry. Upon the marriage or death of his widow his daughter Cecilia became entitled to the use and enjoyment during her natural life of the estate, real and personal: *Held*, that Cecilia did not take a fee under the will, but that her estate should be regarded merely as a life estate. It follows that at the death of Cecilia, if she had left lawful issue her surviving, such issue would have been entitled absolutely to the estate, real and personal. As Cecilia died without leaving such issue the estate, real and personal, vested in the persons designated in the sixth clause of the will, subject to the payment of the bequest specified in the will.

It seems to have been the purpose and intention of the testator to consolidate into one fund the real and personal estate at the death or marriage of his widow, and to bequeath or devise the same accordingly, subject to the satisfaction of the burdens which he imposed upon his estate for the benefit of the persons designated therein, to whom he gave certain sums by way of legacy.

Special Term, November, 1885.

THIS action is instituted for the purpose of obtaining a judicial construction of the said will, and for direction to the plaintiff as such executor in regard to its execution.

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Charles E. Patterson, for plaintiff.

Martin I. Townsend, R. A. Parmenter, R. H. McClellan
and *S. Van Santvoord*, for defendants, severally.

INGALLS, J. — The will in question presents upon its face questions of complication, uncertainty and difficulty, sufficient to justify the plaintiff in asking for instruction from the court in regard to the manner in which he should discharge his duties in executing the will as such executor. Such direction necessarily involves a construction of the will, which I proceed to give without unnecessary prolixity, as I understand its provisions, interpreted as an entire instrument and in accordance with what I conclude to have been the intention of the testator as gathered from the will. By such will the testator bequeaths, after the payment of debts and funeral charges, all of his personal and real estate, except a lot which Elizabeth Akin was to occupy, to his wife, to be used and enjoyed by her during her natural life, or until she should marry. Upon the marriage or death of his widow, his daughter Cecilia became entitled to the use and enjoyment, during her natural life, of the estate, real and personal.

The fourth item of the will is not to be construed as standing alone; but in connection with the other provisions of such will, and be interpreted in accordance with what seems to have been the entire scheme devised by the testator, and sought to be effectuated by the draftsman of the instrument.

It is the policy of the law in regard to the construction of wills, to give effect to every part thereof, to the end that every beneficiary shall receive the bounty of the testator according to his intention as fairly gathered from the entire instrument. This principle of construction is aptly declared by Judge ALLEN in *Terry agt. Wiggins* (47 N. Y., 517), as follows: "But the will must, if possible, be so interpreted as to reconcile its different provisions and give effect to every part of it, and such construction should be put upon the language consistent with the whole scope and terms of the

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will as to accomplish this result." In my judgment to hold that Cecilia took a fee under the will would render the subsequent provisions meaningless, and defeat the apparent intent of the testator; but regarding her estate merely as a life estate which was obviously intended, all of the provisions of the will become harmonious, and each beneficiary will be protected.

It is worthy of remark that all of the beneficiaries under the will are relatives of the testator and natural objects of his bounty. Every will must necessarily receive construction according to its peculiar provisions, as it is rare that two are found precisely alike in structure. If this view is correct, it follows that at the death of Cecelia, if she had left lawful issue her surviving, such issue would have been entitled absolutely to the estate, real and personal. As Cecilia died without leaving such issue the estate, real and personal, vested in the persons designated in the sixth clause of the will, subject to the payment of the bequest specified in the will. Such I deem to have been the intention of the testator as gathered from the entire will, and I do not think such intention should be defeated by declaring the devise contained in the sixth item repugnant to the devise contained in the fourth item of the will (*Norris* agt. *Beyea*, 13 *N. Y.*, 273; *Hatfield* agt. *Snedden*, 42 *Barb.*, 615; *Terry* agt. *Wiggins*, 47 *N. Y.*, 512; *Tyson* agt. *Blake*, 22 *N. Y.*, 558).

It seems to have been the purpose and intention of the testator to consolidate into one fund the real and personal estate, at the death or marriage of his widow, and to bequeath or devise the same accordingly, subject to the satisfaction of the burdens which he imposed upon his estate for the benefit of the persons designated therein to whom he gave certain sums by way of legacy (*Lent* agt. *Howard*, 89 *N. Y.*, 169-177). The executor is justified in asking instruction and the complaint can be sustained for that purpose at least (*Basty* agt. *Briggs*, 56 *N. Y.*, 407; *Week* agt. *Root*, 14 *N. Y. W. Dig.*, 90; *Wager* agt. *Wager*, 89 *N. Y.*, 161).

Matter of Catharine Shaffer, deceased.

SURROGATE'S COURT.

In the Matter of Proving the last Will and Testament of
CATHARINE SHAFFER, deceased.

Will—Insufficient signing and witnessing of a will.

Where a will has been so drawn as to allow blank spaces in the body thereof of such a nature as to allow the insertion of dispositions without interlineations, and

Where the testatrix does not subscribe her name in the presence of both witnesses, and does not acknowledge her signature to the witnesses, although she informs the witnesses that it is her will she wishes them to witness:

Held, that there was no sufficient signing of the will by the deceased in the presence of the witnesses, nor a sufficient acknowledgment to them that she had done so to satisfy the requirement of the statute, and that the paper was not entitled to be admitted to probate.

Westchester county, November, 1885.

A PAPER intended for a last will and testament was prepared and came into the hands of the deceased some time in 1882. There are several blank spaces in the body of it sufficiently large to permit the writing of disposing clauses without interlineations, and a space at the end of the paper for the signature. Spaces were also left for the day, month and year, which remained unfilled. Then follows an attestation clause, thus:

"Subscribed by the testator in the presence of each of us and at the same time declared by her to us to be her last will and testament, and thereupon we, at the request of the testator, sign our names hereto, as witnesses, this day of , 1882.

"And is here signed.

"CATHARINE SHAFFER,
Adm'a.

"J. M. DEARBORN,
M't Vernon.

"JOHN BERRY,
M't Vernon, N. Y."

Matter of Catharine Shaffer, deceased.

The paper so executed was propounded for probate by Charles F. Holm, one of the persons named as executors therein. John Berry, one of the witnesses, testified that the deceased came into his store with a paper so folded that he could see no part of the writing, except the last line of the attestation clause, "and asked me if I would witness her signature, and she made her signature in my presence and asked me to witness it," which he did, and then she said she must go in to see Mr. Dearborn, and get him to do the same thing. Mr. Dearborn's store was a few doors from Mr. Berry's, and he was not present when the paper was signed by Mrs. Shaffer. Berry could not remember that Mrs. Shaffer said it was her last will and testament, but if she had, thinks he would remember it. Mr. Dearborn, the other witness, had no recollection whatever on the subject, but admitted the genuineness of his signature. Both of them had acted as witnesses to a will of the deceased in 1878, the circumstances attending the execution of which they recollected. Subsequently, Mary A. King, a servant of the deceased, to whom a legacy of \$200 had been given by the alleged will, testified that she accompanied the deceased to the stores of the respective witnesses, and that the deceased substantially asked Mr. Berry if he would sign her will and testament, to which he assented; that she and the deceased then went to Mr. Dearborn's store and asked him to sign her will.

Charles F. Holm, in person (*Isaac N. Mills, of counsel*), for proponent.

Chauncey Shaffer, for Louisa Portens and another, heirs, contestants.

Jacob Fromme, for George W. Shaffer, husband, contestant.

Joseph H. M. Porter, for Kate M. Penrose, heir.

Wm. M. Skinner, Jr., guardian *ad litem*, for minor heirs.

Matter of Catharine Shaffer, deceased.

Coffin, S.— The contestants contend that the will was not properly executed, taking the statements of Mrs. King to be true, because the testatrix did not acknowledge her signature to Dearborn, one of the witnesses, who did not see her sign her name, and cite on this point the case of *Mitchell agt. Mitchell* (16 Hun, 97). There the deceased came into the store where the two witnesses were and handed out a paper and said: "I have a paper that I want you to sign." One of them took the paper and partly opened it and saw what it was. The witness probably, from his testimony, saw the signature. The testator said: "This is my will, I want you to witness it." Then the two witnesses signed the paper under the attestation clause. It does not appear that the other witness saw the testator's signature. The testator then took the paper and said: "I declare this to be my last will and testament." At the time of this transaction the paper had the name of the deceased at the end of the paper, but the witnesses did not see him sign, nor was there any acknowledgment by him of his signature in their presence, unless the facts above stated are such acknowledgment. The court held that there was no acknowledgment of the signature to either of the witnesses and rejected the will. This decision was affirmed on appeal in 77 *New York*, 596, but by a divided court.

In *Chaffee agt. The Baptist Missionary Society* (10 Paige, 85) the testatrix, who had subscribed the will by making her mark, but not in the presence of the attesting witnesses, afterwards, and in their presence, placed her finger on her name and said: "I acknowledge this to be my last will and testament." It was held that the will was not well executed. This is approved in the case of *Willis agt. Mott* (36 N. Y., 486). It is difficult to see any distinction between the case of the putting the finger upon the name with the mark and declaring it to be his last will and testament and that of a presentation of a paper with the testator's signature written by him at the foot of it with a declaration that it is his last

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will and testament. I am satisfied on the whole that the decision in the case of *Mitchell* agt. *Mitchell* required that more should be done than merely requesting the witnesses to subscribe their names to a paper with the name of the alleged testator at the end of it, which he says is his last will and testament. By doing so he complies with only two of the distinct requirements of the statute. The other one, that he shall sign it in their presence, or acknowledge that he has signed it, is as equally distinct and imperative as the others, and in the absence of proof that he did one or the other, the requirements of the statute have not been sufficiently complied with to render it a valid testamentary act. But in the case of *Baskin* agt. *Baskin* (36 *N. Y.*, 416) it was held to be a sufficient acknowledgment of the testator's signature where he produces a paper to which he has personally affixed his name, and requests the witnesses to attest it and declares it to be his last will and testament, and that in so doing he does all that the law requires. This doctrine seems to be distinctly affirmed *In the Matter of Will of Phillips* (98 *N. Y.*, 267). Curiously it appears from the surrogate's report of the case in 8 *Denio*, 459, that the testator did acknowledge his signature to both the witnesses, Skinner and Beach, during his conversation with each of them (*And see Rumsey* agt. *Goldsmith*, 3 *Den.*, 494). Hence, although the reasoning of judge LEARNED in the case of *Mitchell* agt. *Mitchell* may seem the stronger, the result reached in 98 *New York* is controlling here, and assuming that the paper was executed and properly attested in the presence of one witness and presented to the other so executed and attested by him, then if the testimony of Mrs. King is to be regarded as true, it might be held that it was well executed as a will.

But I am unable to bring my mind to a belief of her credibility. She and Mr. Berry are in conflict as to their statements of the transaction. He is one of the leading business men in Mount Vernon, a man of character, intelligence and large experience in affairs, and the same may be said of Mr. Dear-

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born, while Mrs. King had for many years been a servant, a part of the time in the family of the deceased, could neither read nor write, and was named as a legatee in the alleged will to the extent of \$200. Mr. Berry's statement of the circumstances is substantially this: the deceased came to his store alone and asked him if he would witness her signature, to which he assented. She then produced a paper so folded that only one line of the writing could be seen, to wit, "our names hereto as witnesses this day of , 1882," and of which he did not read a word, signed her name, and he signed his, and thinks she requested him to write his place of residence after it, which he did. She then said she must go and get Mr. Dearborn to do the same thing, and left his store. There was nothing said by her to impress his mind with the fact that it was an important document. He thinks if she had said it was a will he should have remembered it. She was there only two or three minutes. Under these circumstances it seems to me highly improbable that he was informed of the nature of the instrument, and it was not at all unlikely that a person unfamiliar with the manner of the execution of a will, as the deceased was, as is shown by her signing her name at the foot of the attestation clause and appending to it the abbreviation "adm'x," should have omitted to state what the paper was, especially in her anxiety to conceal its contents as manifested by her.

Mr. Dearborn, the other witness, had no recollection of the matter whatever, but recognized his signature, which was written above Mr. Berry's, apparently for lack of room below it, and although he knew both Mrs. Shaffer and Mrs. King, he does not remember ever seeing them in his store together.

After the lapse of a month from the first examination of these witnesses, Mary A. King was produced as a witness, and was objected to as incompetent, because named as a legatee, to testify concerning any transaction or communication between herself and the deceased. Her examination, how-

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ever, was conducted in such a manner as to avoid the objection. She testified only to conversations in which she took no part, and which had no relation to any transaction between her and the deceased. She was engaged in cleaning house for the deceased, when the latter asked her to go with her to Mr. Berry's store as she wanted to see him. It was but a short distance to the store and was, as she states, between two and three o'clock in the afternoon. It strikes one as a singular proceeding for a lady to take a servant from her work at that hour, to accompany her for no apparent reason. She says she went into the store with deceased "and she shook hands with Mr. Berry and asked him if he would sign her will and testament." He asked her if she was going to die, and she said "no." Then he said "I will sign it." So he went with her up to the desk. "She says they were there about twenty or twenty-five minutes" (Mr. Berry says not more than two or three) and she, witness, was buying ruffling for deceased. They then went to Mr. Dearborn's, where deceased "asked him to sign her will," and he kind of laughed and asked, "have you come with the will?" and she said, "certainly." They then went back to the desk, while the witness bought some salad dressing. They were at Dearborn's twenty-five or thirty minutes. This witness when asked to whom she had communicated these facts, for some time insisted that she had told them to no person whatever, but after much questioning admitted that she had to her lawyer, who proved to have been not her's, but her son's, but she claimed that he was her lawyer in this proceeding. She finally, after denying that she had done so, acknowledged that she had also told another counsel in the case. Taking into consideration all the facts detailed, the material interest which this witness had at stake, evidenced by her having engaged counsel to look after it, her alleged recollection of conversations which, had they occurred, would have so impressed the minds of the intelligent gentlemen who signed the paper that they would not have been readily forgotten and who, after much

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reflection, are unable to recall anything of the kind, lead me to place no credence in the testimony of Mrs. King. It is a pregnant and important fact that Mr. Berry and Mrs. King differ very materially in reference to what both profess to recollect well. The former says the deceased requested him to witness her signature; the latter says she asked him to sign her will and testament. Both statements cannot be true. One witness is surely in error and I feel constrained to believe Mr. Berry. Mrs. King professes to give all of the conversation and she does not state that Mrs. Shaffer requested Mr. Berry to witness her signature. The two statements are conflicting and cannot be reconciled, nor can one be taken as amounting to a publication and the other as a request to sign as a witness, thus together making a valid execution. According to her evidence neither of the witnesses was asked by the deceased to sign her will as a witness. That perhaps was not essential, provided the circumstances warranted the inferring of such request. But relying upon the testimony of Mr. Berry, it must be held that there was no publication of the instrument as a will and it must therefore be rejected. No reference has been made to the attestation clause as an aid in the solution of this matter, as it was manifestly untrue as to one of the witnesses and the other one declares that he did not read a word of it.

The testimony of Mr. Yetman, offered for the purpose of impeaching Mrs. King as to a statement made by her must be disregarded as no sufficient foundation therefor was laid. The evidence supplied by the attorney who drew the will, the object of which was to show that deceased knew the character of the paper, and which was objected to as incompetent under section 835 of the Code, has been disregarded by me as wholly immaterial. The deceased was an intelligent lady and it can hardly be assumed that she did not know the contents and nature of the paper she took to Mr. Berry's store; besides such knowledge on her part is shown by the testimony of Harry Skidmore.

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An order must be entered denying probate of the paper offered as a will, with costs to proponents and contestants out of the fund to be taxed.

COURT OF APPEALS.

THE PEOPLE *ex rel.* SMITH LENT, respondent, agt. JOSEPH B. CARR, secretary of state, appellant.

Surrogates—The limitation of seventy years of age, does not apply to surrogates.

The provisions contained in section 18 of article 6 of the constitution, to the effect that "no person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age," does not apply to persons holding the office of surrogate.

Decided November, 1885.

Marcus L. Cobb, for relator.

Calvin Frost, for respondent.

RAPALLO, J.—The question to be determined on this appeal is whether the provision contained in section 13 of article 6 of the constitution, to the effect that "no person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age," applies to persons holding the office of surrogate.

The important judicial functions exercised by surrogates may afford reason for applying to them a disqualification by age similiar to that prescribed with respect to judges and justices of courts, referred to in the constitution. But the question before us is not whether the disqualification should have been extended to those officers, or whether it should be deemed by analogy to apply to them, but whether by the terms

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of the constitution they are included in it under the designation of persons holding the office of "judge or justice of any court." For the purpose of determining this question it is necessary, in the first place, to consider the context in which the language quoted is used in section 13 of article 6 of the constitution, the whole of that article having been adopted by the vote of the people at the same time, in 1869, as a separate article, known as the judiciary article.

Section 5 of article 5 establishes a court of appeals, to be composed of a chief judge and six associate judges, and to hold office for the term of fourteen years.

Section 6 provides for the continuance of the existing supreme court, to be composed of the justices then in office, with an additional justice to be elected.

Section 12 provides that the superior court of the city of New York shall be composed of six judges; the court of common pleas of the same city, of the three judges then in office, and three additional judges; the superior court of Buffalo, of the judges then in office, and their successors, and the city court of Brooklyn of such number of judges, not exceeding three, as may be provided by law.

Section 13 provides for the election of justices of the supreme court and judges of all the other courts mentioned in section 12, and declares that the official terms of the said justices and judges, who shall be elected after the adoption of the article, shall be fourteen years, and then follows immediately in the same section the provision "but no person shall hold the office of judge or justice of any court longer than until and including the last day of December next, after he shall be seventy years of age."

Section 14 next follows, providing that a compensation shall be established by law for the services of the judges and justices hereinbefore mentioned, which shall not be diminished during their official terms.

It must be observed that up to this point no person has been designated in the constitution as a judge or justice of any

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court except the judges of the court of appeals, the justices of the supreme court, and the judges of the superior court and court of common pleas of the city of New York, of the superior court of the city of Buffalo, and of the city court of Brooklyn.

That the limitation as to age was intended to apply to the judges and justices of those courts is too clear to be capable of misapprehension. The only other officer or body having judicial powers, mentioned in the sections of article 6 preceding section 13, is the commission of appeals. That high tribunal had power, under section 4, to hear and determine certain causes pending in the court of appeals; and by section 5 it was provided that the decisions of the commission should be entered and enforced as the judgments of the court of appeals. But the commission was not designated in the constitution as a court, nor the commissioners as judges, but as commissioners, and it was therefore assumed that the disqualification of age under section 13 did not apply to them, for it is a matter of history that one venerable commissioner held his office without question for several years after he had passed the age of seventy; and in the case of *Settle agt. Van Evera* (49 N. Y., 280), it was decided that section 27 of article 6, which prohibits any judge of the court of appeals from acting as referee, did not apply to a commissioner of appeals because he was not a judge of the court.

All the provisions of article 6 of the constitution bearing upon the question at issue which precede sections 13 and 14 have now been examined, and we next come to section 15, relating to county courts. This section continues the existing county courts and provides that the judges thereof then in office shall hold their offices until the expiration of their respective terms, and that their successors shall be chosen by the electors of the counties for the term of six years. These judges come literally within the words of the constitution, for they are judges of courts designated as such by the constitution (*People agt. Gardner*, 45 N. Y., 812; *People ex rel.*

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Joyce agt. *Brundage*, 78 *N. Y.*, 403). No judicial officer, other than those who have been already named, is in any part of the constitution designated as a judge or justice of any court.

Justices of the peace are mentioned in section 15, and they exercise judicial powers. Two justices of the peace, together with the county judge, compose courts of sessions, with such criminal jurisdiction as the legislature shall prescribe, and such justices may also exercise jurisdiction to a limited extent in civil cases and may hold courts for that purpose. At the same time they exercise other powers. They are in numerous sections of the constitution designated not as judges or justices of any court, but as justices of the peace, and are elected under that designation, and on these grounds it was decided in the late case of *People* agt. *Mann* (97 *N. Y.*, 532) that they did not come within the disqualification of age contained in section 13 of article 6.

Surrogates are throughout all the provisions of article 6 designated as officers by that name, and not as judges or justices of any court. By section 15 of article 6 it is provided that the county judge shall also be surrogate of his county, but that in counties having a population exceeding 40,000 the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be the same as that of the county judge, which is six years. By section 19 the legislature is empowered, on application of the board of supervisors, to provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate in cases of their inability or of a vacancy.

In section 25 surrogates are coupled with justices of the peace and other local judicial officers. Section 27 refers to surrogate's courts, and for their relief authorizes the legislature to confer upon courts of record in any county having a population exceeding 40,000, the powers and jurisdiction of surrogate. In no part of the constitution are surrogates mentioned as judges or justices of any court, and at the time of

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the adoption of article 6, surrogate's courts were not even courts of record, they having been first declared to be such in the Code of 1880.

Reading the clause of section 13, which imposes the disqualification by reason of age, in connection with all the other provisions referred to, it seems to us more reasonable to suppose that the people who voted for the adoption of article 6 understood the disqualification as applying to persons who, in the constitution itself, were in express terms designated as judges or justices of courts, and were popularly known as such and elected by those designations, than to assume that the voters so minutely analyzed the nature of the functions of officers elected under other names as to discover that some of their duties were of a judicial character, and that therefore they might, though not named as such, be construed to be judges. In interpreting constitutions regard must be paid to the popular sense in which words are generally used (*People agt. Goodwin*, 50 *Barb.*, 562; *Commonwealth agt. Dallas*, 4 *Dall.*, 218; *Gibbon agt. Ogden*, 9 *Wheat.*, 188; *Settle agt. Van Evera*, 49 *N. Y.*, 280).

The constitutional provision in question is quite clear and intelligible as applicable to persons popularly known as judges or justices of courts, and named as such in the constitution itself, but we think it would be unwarrantable to extend it by construction to every officer exercising judicial powers, though not commonly known as a judge or justice of a court, but elected by a different title.

The legislature of 1870, which immediately followed the adoption by the people of the judiciary article (*art.* 6), clearly indicated its understanding of the disqualification in accordance with the views above expressed. The act of 1870 (*chap.* 86) was passed for the purpose of carrying into effect the provisions of the judiciary article, and section 8 of that act required all the judges and justices of the courts named in article 6, viz., the judges of the court of appeals, the justices of the supreme court, the judges of the court of com-

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mon pleas and of the superior courts of the cities of New York and Buffalo, and of the city court of Brooklyn, and judges of county courts, to file in the office of the secretary of state a certificate of their age, for the purpose undoubtedly of showing whether they would be disqualified by age from holding their offices before the expiration of the term for which they were elected. It will be observed that there was no provision requiring surrogates or justices of the peace to file any such certificate, clearly indicating that in the judgment of the legislature the disqualification did not apply to those officers.

This legislative action, so closely following the adoption of the constitutional provision, is entitled to great consideration by the court in construing the provision (MARSHALL, *C. J.*, in *Cohen agt. Virginia*, 6 *Wheat.*, 420; MARCY, *J.*, in *People agt. Green*, 2 *Wend.*, 274; CHURCH, *C. J.*, in *People agt. Brundage*, 78 *N. Y.*, 403).

Our conclusion is that the office of surrogate of Westchester will not become vacant on the thirty-first of December next by reason of the present incumbent, surrogate Coffin, having attained the age of seventy years in July last, and that the secretary of state was right in refusing to give notice of the election of a successor.

The orders of the special and general terms should therefore be reversed and the motion for a *mandamus* denied, with costs.

All concur.

Howe agt. Welch.

CITY COURT OF NEW YORK.

EPHRAIM HOWE agt. JAMES P. WELCH.

*Code of Civil Procedure, section 390 — Statute of limitations of a foreign state—
When a defense to action brought here — New promise to pay "when
able" — Burden on plaintiff to prove ability to pay.*

Before the adoption of the Code of Civil Procedure, the statute of limitations of a foreign state constituted no defense to an action brought here, but section 390 of the Code of Civil Procedure has changed the rule to some extent.

In this case the cause of action does not come within the exceptions of section 390, for the reasons: *First.* The cause of action did not originally accrue in favor of a resident of this state, but in favor of a resident of the state of Ohio. *Second.* Because before the expiration of the period of limitation the person in whose favor the cause of action originally accrued did not become a resident of the state of New York as he lived and died in Ohio; and because, *Third.* The cause of action was not assigned before the expiration of the time so limited to a resident of this state.

Where it is sought to revive a debt barred by the statute of limitations by a new promise to pay "when able" the burden is on the plaintiff to prove ability to pay. Failure to establish the conditions upon which the new promise was made is a failure to revive a debt barred by the statute of limitations.

Special Term, November, 1885.

Stickney & Shepard and N. S. Spencer, for plaintiff.

Abbott Bros. and Albert A. Abbott, for defendant.

BROWNE, J. — This is an action brought to recover a balance upon a promissory note for \$1,000, dated February, 1868, due February, 1869, drawn by the defendant to the order of John Gregg, who at the time resided in Ohio and continued to reside there until his death in 1877. Administrators of Mr. Gregg's estate were appointed upon his death, who also resided in Ohio up to August 12, 1884, when they assigned the note in question to the plaintiff, a resident of this city.

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This action was commenced September 24, 1884. When the note became due, the defendant resided in the state of Missouri. In October, 1872, he removed to the State of Iowa and continued to reside there till May, 1883. About January, 1882, the defendant received a credit on the note to the amount of \$500 and interest.

At the trial all the defenses were waived except the defense that the action was barred by the statute of limitation of the state of Iowa. Before the adoption of the Code of Civil Procedure, the statute of limitation of a foreign state constituted no defense to an action brought here (*Miller agt. Brenhams*, 68 N. Y., 83), but section 390 of the Code has changed that rule to some extent. Its provisions, so far as applicable to case at bar, are as follows: "That where a cause of action * * * accrues against a person who is not a resident of the state, an action cannot be brought thereon * * * after the expiration of the term limited by the laws of his residence for bringing a like action except, first, where the cause of action originally accrued in favor of a resident of this state; second, where before the expiration of the time so limited the person in whose favor it originally accrued was or became a resident of the state; or, third, where the cause of action was assigned to and thereafter continuously owned by a resident of the state."

The proscriptive laws of Iowa are contained in the Code of Iowa, section 2529 which provides that "the following actions may be brought within the times herein limited respectively, after their causes accrue and not afterwards, except when otherwise specially declared. * * * Those founded on written contracts * * * within ten years."

It has been conclusively shown that the cause of action does not come within the exceptions of section 390 of the Code, for the reasons assigned by the learned counsel for the defendant in his brief, from which I quote the following: "Because, first, the cause of action did not originally accrue in favor of a resident of this state, but in favor of a resident of the state

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of Ohio; and because, second, before the expiration of the period of limitation the person in whose favor the cause of action originally accrued, did not become a resident of the state of New York, as he lived and died in Ohio; and because, third, the cause of action was not assigned before the expiration of the time so limited to a resident of this state. The period of limitation was ten years from October, 1872. No assignment of the cause of action to a resident of this state was made until August, 1884."

It follows, therefore, that the action cannot be maintained unless the cause of action was revived by a new promise to pay the debt or an acknowledgment or admission in writing made by the defendant within the period of limitation. It is claimed by plaintiff that such a promise and admission have been established by certain letters which were received in evidence in which defendant admits an indebtedness to the original payee and also to his administrators. None of the letters refer specifically to any indebtedness upon the note in suit, nor to any specific sum due thereon to the parties to whom the letters were addressed. Without the aid of extrinsic evidence the text of the letters affords no clue to the nature or amount of the debt to which the admission and new promise referred, and it can only be presumed that the letters had relation to the note in suit from the fact that no evidence of other indebtedness was presented. Without questioning its sufficiency, it may be assumed that the letters referred to the note in suit, but the promise established by these letters is coupled with a condition that he would pay the debt "when able." This is not the precise language used in the letters, but it is a fair construction of the terms contained in them, excepting the condition in which the promise is predicated upon the payee advancing moneys to aid the defendant in other matters. None of the conditions upon which the promise was predicated have been shown to have been fulfilled. Failure to establish the conditions upon which the new promise was made is a failure to revive a debt barred by the statute of limitations

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(*Wakeman* agt. *Sherman*, 9 *N. Y.*, 85; *Tompkins* agt. *Brown*, 1 *Denio*, 247; *Wetzell* agt. *Bussard*, 11 *Wheat.*, 309; *Cocks* agt. *Weeks*, 7 *Hill*, 45; *Teho* agt. *Robinson*, *N. Y. Ct. App.*, October 6, 1885; 1 *Eastern Rep.*, 768).

The evidence offered by plaintiff in support of the defendant's ability to pay was not sufficient to submit to a jury as a question of fact.

It is earnestly and forcibly urged by the learned counsel for the plaintiff that the fair construction to be given to section 390 of our Code is to allow the same rules of revivor in courts of the state of the residence of the party liable on the contract, and he contends that under the provision of the Iowa Code the prescription is removed by establishing a bare written admission of the debt within ten years, and cites the section of the Iowa Code bearing upon the question, which is as follows (*sec. 2539*): "Causes of action founded on a contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same." And in support of his contention he claims he is aided by the courts of that state, which gave the statute a construction by its decision in the case of *Penley* agt. *Waterhouse* (3 *Iowa*, 418). An examination of that case does not disclose that the court passed upon the question of the effect of an admission coupled with a condition as to time of payment. The facts upon which the decision was based are susceptible of but a single meaning, to wit, that the party liable admitted the debt and was unable to pay it. Nothing was said as to when or under what circumstances the party would pay it, and I can find nothing in the context that the court went farther in its decision than to determine that the language used in the writings was an admission of the debt, void of all conditions. This is strongly indicated by the fact that it was urged by the defendant there that the language used implied an unwillingness to pay the debt, which, if so found, would deprive the admission of its cogency as an inferential promise to pay. We are thus led to the conclusion that the courts of Iowa in nowise depart from the rule existing in

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this state that the admission or acknowledgment must show such an evident intention to pay the debt that the law will imply a promise to pay, and if there be a condition attached either to the express or implied promise, the creditor must accept the promise with its accompanying condition, or not at all. The statutes of this state and those of Iowa do not differ materially as to what is necessary to revive the debt. Our statute requires a promise to pay the debt or "an acknowledgment" in writing, while the Iowa statute requires a like promise or an "admission" of it. The words are synonymous, and such being the case the decisions of our own courts are controlling as to what is necessary to revive a debt barred by the statute of limitation. The plaintiff urges in support of his views that a bare admission of the debt being sufficient, one of the letters of the defendant contains such admission in the following words: "Be patient and I will pay you all." This sentence is prefaced by another in the letter referred to upon the same subject, in which the defendant says: "I dislike to owe any one a cent, and will not any longer than I can make the money to pay off all that I owe you and all the rest of mankind."

It is a well settled rule of evidence that all parts of the writing should be considered in determining the meaning or intention of the writer. Applying that rule to the letter referred to, it will be readily seen that the defendant intended to limit the promise to pay upon the condition of his ability to make the money to pay his debts. In truth, each of the letters contains an admission of a debt, a promise to pay and a condition of payment, none of which were fulfilled.

It is settled beyond dispute that the plea of the statute of limitations is a plea to the remedy, and consequently the *lex fori* must prevail. Parties sued in our courts may call to their aid the statute of limitation of the place of their residence within the prescribed limits. Section 390 of our Code adopts so much of the Iowa law as limits the number of years within which this action may be brought. It adopts no more. The

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policy of our law is to exclude the influence of foreign laws upon the jurisdiction or practice of our courts—hence the time within which the action may be brought against a resident of Iowa in this state is limited to ten years, subject only to the expirations provided in section 370. The provision of limitations may be assimilated to our statute of limitations, so that in the case of a resident of Iowa it would read ten years instead of six, the exceptions of the statute as to revival to be determined by the laws of our own state. We cannot by implication give the force of law to more of the statute of another state than the express provision of our laws permit. Our state has not adopted the statute of Iowa with respect to causes which revive an action. It retains its right to determine the degree of the consideration which revives a debt barred by the statute of limitations of another state.

For the reasons stated the verdict directed for the plaintiff will be vacated and judgment directed for the defendant.

SUPREME COURT.

JOHN M. BURKHART agt. JAMES BABCOCK.

Costs—Allowance—Code of Civil Procedure, section 3252.

In an action by a vendor to foreclose a land contract, in which the plaintiff recovers, he is not entitled to the additional allowance provided by section 3252 of the Code of Civil Procedure.

Monroe Special Term, August, 1885.

MOTION by defendant for retaxation of costs.

Q. Van Voorhis, for defendant.

H. W. Morris, for plaintiff.

ANGLE, J.—This is an action by a vendor to foreclose a land contract, in which the plaintiff recovered, and on the

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taxation of costs the per cent provided by section 3252 was allowed to the plaintiff.

I regard the case of *Randolph agt. Stedman* (4 Abb., 262; 3 E. D. Smith, 648), as an authority against the allowance of this item. That was an action to foreclose a mechanics' lien and arose under section 308, Code of Procedure, the provisions of which are embodied in section 3252 of the Code of Civil Procedure. In it the court say: "It is suggested that the course of procedure is analogous to the foreclosure of a mortgage in which case an extra allowance may be granted. It is very true that this proceeding is analogous to the foreclosure of a mortgage, for which alone provision has been made in the section referred to. It is also suggested that it is in the nature of a claim upon real property; but it is not in the language of the statute a proceeding for the determination of claims to real property. As it falls, therefore, within none of the cases provided for by section 308, there is no authority for granting an extra allowance." DALY, J., at the conclusion of his opinion, says: "As the point is suggested for the first time, I have conferred with my brethren and they agree with me that we have no power to grant an extra allowance in such a case." When the above decision was made, section 308, Code Procedure, gave the court power to make allowance, instead of declaring, as section 3252, Code Civil Procedure does, that the plaintiff was entitled to the allowance in certain cases; but that can make no difference in the question of construction here involved.

In *M' Mulkin agt. Hovey* (46 How., 405), in an action on the part of a vendor to compel the vendee to complete a land contract the special term said, *obiter*, that it was not one of the actions named in section 308, Code Procedure. The item complained of must be stricken out.

The clerk was perhaps misled by note C, Bliss' Code (vol. 2, p. 990, to sec. 3252), that "allowances may be granted in proceedings to foreclose a mechanic's lien," citing *Randolph agt. Foster* (*supra*), but as we have seen the case does not so

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hold. The same note "C" also says, the allowance may be granted in an action to compel specific performance of a contract for the sale of real estate, citing *Weeks agt. Southwick*, (12 *How.*, 170); but as I read that case the court said (*p.* 171) "nor is this a case for an extra allowance. The action is not brought to recover money or property, but merely for equitable relief. Such a case is not within the provisions of three hundred and eighth section of the Code."

The motion is granted, without costs.

SUPREME COURT.

ADELAIDE E. MASON agt. CLARISSA MASON *et al.*

*Dower — When provision for wife should be held to be in lieu of dower —
Partition.*

Where a testator devised one-third of his real property to his widow for life with remainder to his sons, also devising the other two-thirds to the sons:

Held, that there was thus a total disposition of his realty, and any allowance of dower to the widow in addition to the devise would overturn the plain scheme of the will, and is inconsistent with the disposition made of the rest of the estate. In such case the court infers an intention of the testator that the provision for the wife should be in lieu of dower.

That the testator has left his widow a life estate in one-third of the premises does not prevent the owners in fee of the two-thirds from partitioning the property and realizing their shares. The rights of the tenant for life may be protected by provision in the decree.

Special Term, November, 1885.

Isidor Grayhead, for plaintiff.

Jacob L. Hanes, for defendant Clarissa Mason.

Horace Secor, Jr., for defendant Sarah A. Mason.

John T. Cornell, for guardian *ad litem*.

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BEACH, J. — The plaintiff is possessed of an estate of inheritance in an undivided portion of the premises described in the complaint. This fact makes inapplicable section 1533, Code of Civil Procedure, which relates wholly to an action for partition between joint tenants or tenants in common of an estate in reversion or remainder. The case of *Sullivan agt. Sullivan* (66 N. Y., 37) was met by the above Code provision, and only held that a reversioner could not maintain partition, because of not having either an actual or constructive possession. I do not think it possible that because the defendant Clarissa Mason has a life estate in one-third of the premises, the owners in fee of the two-thirds are prevented from partitioning the property and realizing their shares. The rights of the tenant for life may easily be protected by provision in the decree.

The testator devised the third of his real property to his widow, the defendant Clarissa Mason, for life, with remainder to his sons. The other two-thirds he devised to them. There was thus a total disposition of his realty, and any allowance of dower to the widow in addition to the devise would overturn the plain scheme of the will, and is inconsistent with the disposition made of the rest of the estate. In such case the court infers an intention of the testator that the provision for the wife should be in lieu of dower (*Vernon agt. Vernon*, 53 N. Y., 351; *Dodge agt. Dodge*, 31 Barb., 413; *Bull agt. Church*, 5 Hill, 206).

Judgment for plaintiff, with costs.

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SUPREME COURT.

ALIDA J. COLE agt. GEORGE W. COLE *et al.*

Will — Construction of — Dower — When provisions of will must be regarded as intended in lieu of dower.

Where there is no direct expression of intention that the provision contained in the will shall be in lieu of dower, the question always is whether the will contains any provision inconsistent with the assertion of a right to command a third of the land to be set out by metes and bounds for dower. The intention of the testator need not be declared in express words, it may be implied if the claim of dower would be plainly inconsistent with the will.

Where the will gave all the testator's real and personal estate to plaintiff (widow) as executrix and John M. Corliss and William Carley as executors in trust for uses and purposes therein stated, among which are the following: "*First.* To receive and collect the income thereof, and to pay the same for my debts, and the incumbrances upon my estate, after the payment of such sums as may be necessary for the support and education of my family and children, in which matters I desire my executrix and executors to be liberal. *Second.* To purchase in their own names as such executrix and executors a homestead for my wife and family if I shall not do so in my lifetime, and in such homestead all my children shall be entitled to a home while they remain unmarried." The testator in his lifetime purchased the homestead and owned it at the time of his death:

Held, that the intention of the testator is reasonably clear that the widow should take all of her interest in that homestead under the will. She is given an interest equal to that of each child. The devise must contemplate a homestead discharged of dower, otherwise the object of the testator as expressed might be defeated by assumption of dower right, and possible sale of the homestead under such claim.

The testator directed that in case of the remarriage of his wife *all* of his estate shall be divided equally among his four children, and *be paid to them respectively as they arrive at full age*:

Held, that if one-third of the real estate were to be set apart to the widow as dower, a division of *all* of the estate among such children could not take place until the widow's death notwithstanding a remarriage by her. Thus a provision of the will would be defeated.

Special Term, November, 1885.

Cole agt. Cole *et al.*

Robert S. Hudspeth, for plaintiff.

Robert H. McClellan, for defendants.

OSBORN, J.—This is an action for admeasurement of dower, &c. In November, 1883, upon notice of plaintiff's attorneys, and without opposition on the part of the defendants' attorney, the action was sent to a referee to take proof of the material facts stated in the complaint and report thereon to the court. And such report was subsequently made, and in April last interlocutory judgment was granted by me without opposition by defendants' attorney. The case is now before me on application for final judgment in favor of the plaintiff, which is resisted by defendants' counsel, who now maintains that plaintiff is not entitled to dower as claimed; that such claim is repugnant to the will referred to in the complaint, and that the provisions of such will in favor of the plaintiff having been accepted by her constitute a bar to the demand she makes in this action.

The position now taken by defendants' counsel should it, seems to me, have been assumed at an earlier stage in the case, but as counsel for plaintiff has raised no objection to its being now considered, I shall assume that none is claimed.

The question presented is certainly difficult of a clear and satisfactory solution. The authorities to which my attention has been directed by plaintiff's counsel, and which I have been able to obtain for examination, argue with much force the general propositions advanced by him, and particularly *Sanford* agt. *Jackson and others* (10 *Paige*, 266); *Lewis* agt. *Smith* (9 *N. F.*, 502). But upon a careful analysis of the will in this case, compared with the provisions of the wills referred to in the reported cases above mentioned, and in the light of the more recent decisions of *Savage* agt. *Burnham* (17 *N. Y.*, 561); *Tobias* agt. *Ketcham* (32 *N. Y.*, 319); and *Matter of Surplus Moneys, &c., in Estate of John C. Zahrt* (94 *N. Y.*, 605), I am of opinion that in this case the pro-

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visions made for the plaintiff by the will must be regarded as having been intended by the testator in lieu of dower.

Where there is no direct expression of intention that the provision contained in the will shall be in lieu of dower, the question always is whether the will contains any provision inconsistent with the assertion of a right to demand a third of the land to be set out by metes and bounds for dower (*Matter of Zahrt, supra*). The intention of the testator need not be declared in express words; it may be implied if the claim of dower would be plainly inconsistent with the will.

The will under consideration gives all the testator's real and personal estate to this plaintiff as executrix, and John M. Corliss and William Curley as executors, in trust for uses and purposes therein stated, among which are the following as stated in the will:

"*First.* To receive and collect the income thereof, and to pay the same for my debts and the incumbrances upon my estate, after the payment of such sums as may be necessary for the support and education of my family and children, in which matters I desire my executrix and executors to be liberal.

"*Second.* To purchase in their own names as such executrix and executors a homestead for my wife and family, if I shall not do so in my lifetime, and in such homestead all my children shall be entitled to a home while they remain unmarried."

It was conceded on the argument (as I understood it) that the testator in his lifetime purchased the homestead and owned it at the time of his death. I take it that the intention of the testator is reasonably clear that the widow should take all of her interest in that homestead under the will. She is given an interest equal to that of each child. The devise must contemplate a homestead discharged of dower, otherwise the object of the testator, as expressed, might be defeated by assumption of dower right and possible sale of the homestead under such claim (*Miall agt. Brain, 4 Mad. Rep., 119; Roadley agt. Dixon, 3 Russ. Rep., 192; Sanford agt. Jackson, 10 Paige, 27⁽¹⁾*).

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In *Lewis agt. Smith (supra)* the court says: "There is no person who takes an interest under the will during her (the widow's) lifetime with which the claim of dower will conflict." This can hardly be said of the will in the case at bar.

Other provisions of the will, in connection with those I have mentioned, indicate to my mind that the intention of the testator was that the widow's interest in his estate should be in common with his children so long as she remained his widow; that it should arise from the will, and that she should have no other or further interest. The testator directs that in case of the remarriage of his wife *all* of his estate shall be divided equally among his four children, and *be paid to them respectively as they arrive at full age*. If one-third of the real estate were to be set apart to the widow as dower, a division of *all* of the estate among such children could not take place until the widow's death, notwithstanding a remarriage by her. Thus a provision of the will would be defeated.

If the view I have taken is correct, this action cannot be maintained. Plaintiff's application for final judgment is therefore denied. An order to carry out this decision will be settled by me upon notice to counsel.

NEW YORK CITY COURT.

EMMA BIRNEY agt. JONAS S. WHEATON.

Married women—Separate personal effects—When may be detained by virtue of innkeeper's lien—Evidence.

Where husband and wife board at a hotel the husband is presumptively liable for the bill, but it is competent for the hotel-keeper to show that the husband was impecunious, and that credit was given to the wife so as to justify the detention of her property by virtue of the hotel-keeper's lien.

General Term, November, 1885.

Before MOADAM, C. J., NEHRBAS and HYATT, JJ.

Birney agt. Wheaton.

APPEAL from judgment, entered on verdict in favor of the plaintiff.

McADAM, C. J. — Independently of the statute of 1884 (*chap.* 381), enacted after the board bill herein was contracted (and on that account inapplicable to the present contention), a married woman might have contracted a board bill on her own credit and responsibility. In the present case the defendant, in order to establish his lien upon the plaintiff's property, offered to prove that the plaintiff was the head of the family, was the guest in the defendant's house, and the person who was trusted; that she had money and credit and her husband none; and all this testimony was ruled out under exception. We think the testimony was competent and ought to have been admitted. If upon such evidence the jury had found that the credit was given to the plaintiff, and not to her husband, the defendant, as a hotel-keeper, had the right to detain the plaintiff's property until the board bill was paid, and was not liable to her in the present action of claim and delivery without proof of tender of the amount due and refusal to deliver after tender made. The case of *McIlwaine* agt. *Hilton* (7 *Hun*, 594) only applies where the wife is supported by the husband, and the credit is given to him.

We cannot imagine why a wife with credit cannot take her husband, who has none, to a hotel, and in order to procure board and shelter for her family arrange that she and not the impecunious husband shall pay the bills (*Maxon* agt. *Scott*, 55 *N. Y.*, 247; *Tiemeyer* agt. *Turnquist*, 85 *N. Y.*, 516). If this were not so, a wife, however wealthy, might find it difficult to find rooms in a hotel, simply because her husband was unfortunate enough to be impecunious. These observations are made simply to show that the rulings made at the trial might lead to the impracticable results suggested.

It follows, therefore, that the judgment appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event, to the end that the proof excluded

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may be admitted upon the new trial, and the question of fact whether the credit was given to the husband or wife submitted to the jury.

NEHRBAS and HYATT, JJ., concurred.

SUPREME COURT.

JAMES SCOTT and others, respondents, agt. ALEXANDER REED, Jr., appellant.

Arrest—Sufficiency of proof to support order of—Code of Civil Procedure, section 550.

Proof that one of two partners withdrew a large amount of money from the business of the firm for the reason that it had suffered severe losses, and that the other partner had already transferred a large portion of his property to his wife without consideration, will not support an order of arrest against the partner who withdrew the money, without further proof that he had either disposed of any part of this sum or intended to do so to defraud his creditors.

First Department, General Term, November, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order denying a motion to vacate an order of arrest.

James M. Smith, for appellant.

F. N. Bangs, for respondents.

DANIELS, J. — The order was made under the authority of subdivision 2, section 550 of the Code of Civil Procedure. The application for it depended wholly upon two affidavits, one of which was devoted to proof of the indebtedness in this action, and of other indebtedness owing by the defendant who

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has appealed, and his copartner. By the other affidavit it was stated that the partner of the appellant had informed the person making it, that the appellant had withdrawn \$4,800 in cash, being the larger portion of his capital, from the firm, and had concealed its withdrawal by false entries made by himself in the copartnership books. This statement was communicated to Reed, the appellant, who admitted that he had withdrawn this amount from the funds of the firm, but excused himself for doing so by the statement that losses had been suffered in the business, and that his partner Atwater had transferred a large portion of his property to his wife without consideration. From this statement and a statement exhibiting the financial condition of the firm to a mercantile agency, the conclusion was drawn by the persons making the affidavit that both defendants, since the making of their purchases, had removed or disposed of their property, or were about to do so, with intent to defraud their creditors. And the latter part of the statement made by the appellant as it was further sustained by the information received from Mr. Bradley, showing the transfer of corporate stock by Atwater to his wife, may have been sufficient to support an order for his arrest on this ground against Atwater. But the fact that he may have disposed of his property to defraud his creditors, or the creditors of the firm, will not support an order for the arrest of his copartner Reed. To entitle the plaintiff to such an order the law requires that the charge of fraudulent misconduct of the alleged description shall be sustained against the person to be arrested, and that will not be proved simply by showing such misconduct on the part of his partner (*National Bank, &c.*, agt. *Temple*, 39 *How.*, 432; *Hathaway* agt. *Johnson*, 55 *N. Y.*, 93; *Sherman* agt. *Smith*, 42 *How.*, 198).

But neither of the affidavits establishes the fact that any fraudulent disposition was made or intended by Reed. All that has been proved against him is that he drew this amount of money from the business of the firm for the reason that it had suffered severe losses, and his partner Atwater had already

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transferred a large portion of his property to his wife without consideration. It cannot be inferred from these facts, without further proof, that Reed had either disposed of any part of this sum of money or that he intended to do so, to defraud any of his creditors, and without that inference being supported, the plaintiff was not entitled to an order for his arrest (*Hoyt* agt. *Godfrey*, 83 *N. Y.*, 669). In this respect the case is distinguishable from *Hitchcock* agt. *Peterson* (14 *Hun*, 389), where positive fraud was found to be sustained against both of the defendants.

To entitle a party to an order of arrest, a reasonably plain case must be made out. That has been so frequently held as to require no reference to the authorities supporting the principle. Such a case was not made out against the defendant Reed, and the order from which the appeal has been taken should be reversed, with ten dollars costs and also the disbursements, and an order made vacating the order of arrest.

DAVIS, P. J., and BRADY, J., concurred.

N. Y. COMMON PLEAS.

In the Matter of the Assignment of JACOB S. COHEN & Co.
to SAMUEL P. HINMAN.

Removal of assignee—What is proper notice in proceedings for removal, where there are three assignors—Practice.

In a proceeding for removal of an assignee who has misconducted himself, where there are three assignors, one of whom has left the state, notice to one assignor is properly notice to all; though the better course would be to give the statutory five days' notice to the two within the state, in the ordinary way and to serve the absent assignor by depositing a notice in the post-office, addressed to him at his last known place of residence giving double the time.

Special Term, November, 1885.

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DALY, C. J. — Where a statute declares what is to be done in giving notice, it must be strictly followed. But except in those particulars which the statute specifies, everything else in reference to the notice is under the control of the courts. All that the statute here specifies is that due notice of not less than five days of the motion to remove the assignee is to be given to the assignor. Where the term due notice is used in a statute, it is generally understood as referring to the length of time that it is to be given (*Wade on the Law of Notices*, sec. 1324), and it has no greater signification here, where the length is fixed by the statute. The act simply provides for a notice to the assignor, but in this case there are three assignors, one of whom has left the state and whose whereabouts are unknown, further than that he is somewhere in Florida.

The only interest the assignors have under the assignment is the possibility that something may remain after the payment of their creditors to which they would be entitled — an interest which would be a joint interest, and where parties have a joint interest as in the case of partners, service of notice upon one has been regarded as equivalent to notice to all (1 *Wood's Collyer on Partnership*, 715; *Brown* agt. *Turner*, 15 *Ala.*, 832; *Carman* agt. *Townsend*, 6 *Wend.*, 206). But as this is a statutory provision there may be some doubt as to whether this rule would apply to it, and I think the better course is to hold that the notice should be given to each of the assignors. As two of them are within the state, it can be served upon them in the ordinary way, and as respects the remaining one, who has left the state, and whose precise whereabouts are unknown, the service may be such as the court shall direct, there being nothing in the statute as to the service of notice, except that the time is to be at least five days. We would not, in such a case, be justified in applying the provision made in the act for giving notice to creditors residing out of the state, for that notice is by an advertisement once a week for six weeks; while the provision under con-

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sideration here is for a notice of not less than five days, and the delay incurred for such a length of time as six weeks, might be a very serious matter in cases where the assignee had misconducted himself, and where his prompt removal was essential to preserve the assigned property and secure the faithful administration of the trust. As the statute has made no provision for a case like this, of an assignor who has left the state and yet requires notice, I think the proper course is to, follow as nearly as possible the provision of the Code respecting the service of notices and other papers in actions; that is, by depositing the notice, as provided in section 797, in the post-office, addressed to the absent assignor at his last known place of residence, giving double the time as required by the next section, which would in this case be ten days. It is true that such a service is a mere formality, but when the party to be served has left the state and his whereabouts are unknown, it is all that the circumstances of the case will admit of.

As the statute requires that notice of the motion shall be given, and has not in a case like this provided how it is to be served, all that the court can do in compliance with the statute is to direct the kind of notice to be given, even though it be but a mere formality; for it is very plain that the statute did not intend that creditors should be deprived of the right which it gives them, to have an assignee removed who has misconducted himself or is incompetent, because notice cannot be brought home to the knowledge of an assignor who has left the state and whose place of abode could not be ascertained after diligent inquiry.

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SUPREME COURT.

MARY I. TIMERSON agt. CHARLES W. TIMERSON.

Divorce—Adultery—Complaint—Demurrer—When condonation of adultery by subsequent cohabitation with knowledge not a bar to an after-brought action for divorce for such adultery.

Condonation of adultery by subsequent cohabitation with knowledge does not bar an after-brought action for divorce predicated on such adultery, where the condonation is upon the promise by the guilty party (the husband) that he would in all things thereafter treat his wife kindly and in a proper manner, and would be in all things a good and affectionate husband to her, when such promise has been violated

Cayuga Special Term, July, 1884.

DEMURREE to complaint for divorce on the ground of adultery.

L. E. Warren, for defendant.

F. D. Wright, for plaintiff.

ANGLE, J.—The question on this demurrer is whether condonation of adultery by subsequent cohabitation with knowledge bars an after-brought action for divorce predicated on such adultery, where the condonation is upon the promise by the guilty party (the husband) that he would in all things thereafter treat his wife kindly and in a proper manner, and would be in all things a good and affectionate husband to her, and which promise he has violated.

The Code of Civil Procedure (*sec.* 1758) declares that the plaintiff is not entitled to a divorce, although the adultery be established, where the offense charged has been forgiven by the plaintiff, and that the forgiveness may be proved, either affirmatively or by voluntary cohabitation of the parties with knowledge of the fact. The language of the Revised Statutes (2 R. S., 145, *sec.* 145, *sub.* 2) is that the court may deny a divorce in such case. Counsel have cited and exam-

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ined many authorities as to whether condonation, evidenced by cohabitation with knowledge, is, by legal inference, conditioned upon subsequent kind and proper treatment. The argument in favor of such an implied condition is stated by chief justice SAVAGE in *Johnson agt. Johnson* (14 *Wend.*, 642, 643, 644), while the argument opposed is set forth in the opinion of senator TRACY in the same case (*pages* 646, 647). A majority of the court of errors agreed with the chief justice. This case of *Johnson agt. Johnson* has been subject to some criticism, the above question having been decided by but one majority for the reversal of the decision of the chancellor, but it is a binding authority, I think. The case of *King agt. Baldwin* (17 *Johns.*, 384) was also a case where the decision of the chancellor had been reversed by a majority of one. Afterwards there were *dicta* condemning the rule in *King agt. Baldwin*, and the question of its authority came before the court of appeals in *Remsen agt. Beekman* (25 *N. Y.*, 552), and the two judges (WRIGHT and GOULD) writing opinions (*pages* 556, 561), regard *King agt. Baldwin* as authority settling the rule involved in the case.

The present case however involves another question than *Johnson agt. Johnson*. There the question was whether the law raised a certain implication; here the complaint avers the existence of the fact which was in *Johnson agt. Johnson* sought to be implied, viz., that the husband actually promised the wife, as part of the agreement, that he would thereafter treat her kindly and in a proper manner. The law is lenient towards the wife in regard to condonation by cohabitation (*Harnett agt. Harnett*, 55 *Iowa*, 48).

My conclusion is that the violation by the defendant of the conditions of the condonation revives the wife's right of action for his previous adultery, or rather that the alleged condonation is not a bar to such action.

Judgment ordered for plaintiff on demurrer to complaint, with leave to defendant to answer on payment of costs of demurrer.

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SUPREME COURT.

PORTER G. DENNISON agt. WILLIAM F. TAYLOR.

Deed — Conveyance — Reservation — One who parts absolutely with the title to land to another cannot reserve to himself the right to its purchase-money when subsequently sold.

He who conveys the absolute fee of real estate to another cannot retain the right to the purchase-price when subsequently sold. There is a distinction between the occupancy of one's property which must be temporary, unless the title of the owner is acquired, and one which is known to be permanent because the right to maintain it exists; and he who parts absolutely with the title to land to another cannot reserve to himself the right to its purchase-money where subsequently sold, because such a reservation would be inconsistent with the grant.

The defendant who was the owner in fee of a farm of land through which a railroad passed, and also of that part thereof which such railroad occupied and upon which it was constructed, which ownership was derived by and through a warranty deed to him from the assignor of the plaintiff, recovered from such railroad or its receiver the sum of \$1,000 as a compensation for the fee of the land which the road occupied, and for the depreciation in value of the entire farm by reason of such title being acquired to the strip occupied by the railroad:

Held, that the defendant's right to such damages was perfect through the deed from the plaintiff's assignor, which the reservation therein contained in favor of the grantor did not and could not reserve to such grantor, because such a reservation would be inconsistent with and repugnant to the deed and the estate in fee which it conveyed to the defendant; and as the defendant recovered such damages for himself and not for the plaintiff, the latter cannot maintain this action which rests upon the theory that the moneys paid to the defendant therefor were received to and for the use of the plaintiff.

Rensselaer Circuit, January, 1884.

R. H. McClellan and E. L. Fursman, for plaintiff.

Mr. Foster, for defendants.

WESTBROOK, J. — In this cause, which was tried before the court without a jury at the Rensselaer circuit in January, 1884, the plaintiff claimed to recover for certain moneys

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received by the defendant under the following circumstances : On the 13th day of January, 1873, by deed bearing date on that day, one George T. Dennison and wife conveyed to the defendant a farm situate in the town of Berlin, Rensselaer county and state of New York. At the time of such conveyance a strip of land about four rods in width and running across the premises conveyed was in possession of the Lebanon Springs Railroad Company, but to it the company had acquired no title, and the fee thereof passed to the defendant Taylor by the deed from Dennison just mentioned. The deed to Taylor contained this clause : " There is reserved all the damages sustained in consequence of railroad crossing lands herewith conveyed."

In 1881, in a proceeding instituted by him for that purpose against the receiver of the Lebanon Springs Railroad, there was awarded to the defendant the sum of \$1,000 for the land occupied by it, and the depreciation in value of the farm by the railroad crossing through it, upon his executing and delivering to the receiver a conveyance in fee of the premises occupied by the railroad. The defendant executed such conveyance and received the \$1,000 from the receiver. The plaintiff, who is the assignee of George T. Dennison, the defendant's grantor, demanded from the defendant the sum of \$1,000 paid by the receiver of the Lebanon Springs Railroad, and on the refusal of the defendant to pay brought this action to recover the same.

The claim of the plaintiff is founded upon the clause in the deed to the defendant hereinbefore given, which " reserved all the damages *sustained* in consequence of railroad crossing lands conveyed," and upon the construction to be given to such clause and the validity thereof the action depends.

The argument of the plaintiff is in brief this : at the time of the conveyance to the defendant the damages were complete. The railroad was then in possession of the strip of land through the farm, and the damage done to such farm by depriving the owner of a part of his property, and the depre-

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ciation in value of the remainder by reason of the occupation of the strip for railroad purposes had then been sustained, and because then existing they were reserved by the deed to the defendant's grantor.

If the premise that all the damages existed at the time of the conveyance was true, and if the grantor of the fee of real estate could legally reserve to himself the purchase-price thereof when subsequently sold by his grantee, it would be difficult to resist the conclusion. The premise, however, is not true, and he who conveys the absolute fee of real estate to another cannot retain the right to its purchase-price when subsequently sold. The premise ignores the distinction between an occupancy of one's property, which must be temporary unless the title of the owner is acquired, and one which is known to be permanent, because the right to maintain it exists; and he who parts absolutely with the title to land to another cannot reserve to himself the right to its purchase-money when subsequently sold, because such a reservation would be inconsistent with the grant (*De Peyster agt. Michael*, 6 *N. Y.*, 467, 492, 493, 494, &c). At the time of the conveyance to the defendant the damage to the farm by the extinguishment of the owner's title in a part thereof had not been sustained, and the right to permanently occupy such part as owner for the purpose of a railroad to the depreciation in value of the remainder had not been acquired. The railroad was then in possession of a part of the land, either as a squatter or by permission of the owner for a limited time. Such occupation, while it lasted, of course damaged the owner by depriving him of the enjoyment of a part of his property and subjecting him to the annoyance and inconvenience of a railroad track across his farm, but damage to a farm caused by an occupancy of a part, capable of being soon ended and terminated, is quite another and different thing from an occupancy founded upon actual title to the land occupied, which permanently deprives an individual of a part of his farm, and permanently subjects him to the annoyance and inconvenience

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of a railroad operated through its center. In other words, a right of occupancy for a short period of time, or an occupancy which is a trespass, and therefore capable of a speedy determination, depreciates the value of the entire farm much less than one which is permanent, because founded on an acquired right. The damages which had been "sustained" by an occupancy founded upon either a temporary right derived from the owner, or upon no right, but in either case soon determinable, were those which existed at the time of the conveyance to the defendant; but a *right* as owner to occupy had not been acquired by the railroad, and the damage to the owner by the extinguishment of his title to a part of his farm, which injures, both by permanently depriving him of the enjoyment and use of the property taken and the inconvenience to the farm as a whole in future years, had not yet been "sustained." Under such circumstances the conveyance is made to the defendant of the fee of the whole farm, including that occupied by the railroad. Can it be reasonably or even plausibly argued that the grantor intended otherwise than he did? That when he conveyed to the defendant a strip of land in the possession of a railroad company, warranting that the deed of conveyance gave the defendant a good title in fee thereto, he intended to reserve to himself the purchase-price of such land if the railroad company subsequently acquired it? To these questions the answer, it seems to me, is plain. The clause in the deed reserved to the grantor the damages which *had* been "sustained" when the deed was made, and not those which *would be* "sustained" by the extinguishment of the owner's title, which could only have their being when such right was acquired. Nay, the fact that Dennison conveyed the fee of the land occupied by the railroad to the defendant forbids the construction of the reservation claimed by the plaintiff. The absolute ownership of property involves the right to its purchase-price when sold, and the reservation of the purchase-price, or any part thereof, to the grantor upon a subsequent sale by the grantee,

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would be, as has been before stated, void (*De Peyster* agt. *Michael*, 5 N. Y., 467, 492, 493, 494, *etc.*, before cited). The clause in the deed upon which the present action is based must, therefore, receive some other interpretation than one which withholds from the purchaser of the fee of land one of its most legitimate fruits—the right to dispose of it to some other person and to receive its purchase-price.

What is evident from the language of the deed is made still more apparent by the conduct of the parties when the deed to the defendant was given. His grantor at first proposed to retain the title to the land occupied by the railroad, but the defendant refused to accept the conveyance if that exception was made. The conveyance was finally drawn in the form it now is, and was accepted. If the value of the title, or rather if the right to receive compensation for the land when the same should be conveyed or sold, was intended to be reserved, there was still only one way of accomplishing it, and that was to except the land from the conveyance and retain its ownership. When a conveyance in that form was refused, and one required and given which passed the fee of the whole property, whatever else was intended by the reservation, it is reasonably clear that it could not have been its intention to reserve to the grantor and seller its purchase-price at a future sale, or if that was intended the intention was defeated by the conveyance of the fee, with which such intention was utterly inconsistent. It could, therefore, have only one legal meaning, and that is plainly embodied in the reservation itself — “the damages *sustained* ;” *i. e.*, those *already* suffered, and not those *to be* “sustained” or suffered by the acquisition of actual title, were those reserved, and no other.

For the reasons which have been given the defendant is entitled to judgment with costs. It is not seen that the defendant has recovered from the railroad or its receiver any damages which belonged to the plaintiff. The execution of the conveyance by the defendant to the railroad of the land

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occupied by it shows the ground of his recovery. He received \$1,000 for the value of the land of which he was the absolute owner in fee and for the depreciation in value of the rest of his farm caused by the right *then first acquired by the railroad* to permanently occupy the same. These are the only items of damages for which the defendant recovered and neither of those were reserved or could be reserved in favor of a grantor who conveys the absolute fee of real estate to another. If in the making up of the judgment which the defendant recovered any item of damage reserved by the deed to him in his grantor was recovered for, though none is seen, that must present a question between the plaintiff and the railroad.

The defendant could only recover for that which belonged to himself. His deed was on record. With its contents the railroad and its receiver are presumed to have been familiar. If the defendant has recovered for anything to which he had no title the plaintiff is not damaged, for his own action is still perfect and it was folly for the railroad to submit to a wrong recovery. Indeed the argument just presented is applicable to the entire claim of the plaintiff. The defendants sued and recovered for damages and injuries sustained by himself. He did not sue or profess to sue for the benefit of the plaintiff or any other person but for his own. His rights and those of the plaintiff were open and of record. The recovery was for that which was adjudged to be his. The recovery may be wrong, but that is a question between him and the party from whom it was recovered. The money he received was for his own use and not for the use of the plaintiff. If the defendant had no right to the money because the damage for which it was awarded belonged not to him, but to the plaintiff, the latter has a remedy by seeking his rights from those who did him the injury. The damages "sustained" when the deed was given to the defendant, and all that such deed could legally reserve to him are still his due from the party causing them. The record is his protection. An unauthorized payment to another of what is due to him is no defense to his claim, his

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cause of action, if any exists, is still perfect and without any flaw caused by the recovery of the defendant (*Patrick agt. Metcalfe*, 37 *N. Y.*, 332; *Butterworth agt. Gould*, 41 *N. Y.*, 451). To the money received by the defendant the plaintiff has no title. The former collected it as his own, and if the ground upon which the plaintiff rests his present action that the damages for which the defendant obtained his recovery belonged to himself and not to the defendant, as shown by the recorded deed under which the defendant claimed, is sound, the defendant has done him no injury for he may still enforce the rights which he reserved for his own benefit, and which no payment to another could bar.

In conclusion, the case may thus be summarily presented. The defendant who was the owner in fee of a farm of land through which a railroad passed and also of that part thereof which such railroad occupied and upon which it was constructed, which ownership was derived by and through a warranty deed to him from the assignor of the plaintiff, recovered from such railroad or its receiver the sum of \$1,000 as a compensation for the fee of the land which the road occupied, and for the depreciation in value of the entire farm by reason of such title being acquired to the strip occupied by the railroad. The defendant's right to such damages was perfect through the deed from the plaintiff's assignor, which the reservation therein contained in favor of the grantor did not and could not reserve to such grantor, because such a reservation would be inconsistent with and repugnant to the deed and the estate in fee which it conveyed to the defendant; and as the defendant recovered such damages for himself and not for the plaintiff, the latter cannot maintain this action which rests upon the theory that the moneys paid to the defendant therefor were received to and for the use of the plaintiff.

D I G E S T

CONTAINING THE WHOLE OF

2 HOWARD (NEW SERIES), ANTE, AND QUESTIONS OF PRACTICE CONTAINED IN 35 AND 36 HUN, AND 98 AND 99 NEW YORK REPORTS.

Attention is called to the four additional headings "CODE OF CIVIL PROCEDURE," "CODE OF CRIMINAL PROCEDURE," "CODE OF PROCEDURE" and "PENAL CODE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of the Codes.

ABATEMENT AND REVIVAL.

1. A cause of action to recover the penalties imposed by sections 12 and 15 of the general manufacturing law does not abate on the death of a sole plaintiff (although otherwise on the death of a sole defendant), but may be revived and continued by and in the name of the personal representatives of the deceased plaintiff. (*Bonnell* agt. *Griswold*, ante, 451.)
2. Survival of action for slander brought by partners—when the action does not abate by reason of the death of one of the partners. (*See Shale* agt. *Schantz*, 35 Hun, 622.)
3. The cause of action, given by the statute (*chap. 450, Laws of 1847; Code of Civil Pro., sec. 1912*) to the representatives of a decedent, whose death was caused by the negligence of another, abates upon the death of the wrong-doer, and an action cannot be maintained against his representatives. (*Hegrich* agt. *Keddie*, 99 N. Y., 258.)
4. The history of the statutory modifications in this state of the rule of the common law as to the survivability of actions given, and the authorities upon the subject collated. (*Id.*)

5. An action under civil damage act abates on the death of defendant and cannot be revived against his personal representatives. (*See Moriarty* agt. *Bartlett*, 99 N. Y., 651.)

ABDUCTION.

1. It is not necessary, to constitute the crime of abduction, as defined by subdivision 1 of section 282 of the Penal Code, that the accused should in any case use any force or practice any fraud or deception, and it is sufficient within the statute if the female is induced by his request, advice or persuasion to go from the place where the accused met and approached such female with the request and solicitation for her to accompany him, or meet him at some other place indicated by the accused, with the intent and purpose there to accomplish the act of her defilement. (*The People* agt. *Seeley*, ante, 105.)
2. The offense may be accomplished without an actual manual capture of the female, nor is it necessary that she should be taken against her will, nor is it necessary that the girl should be taken from her parents or other custodian of her person. (*Id.*)

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ACTION.

1. An action may be brought by one of the next of kin of a deceased person "on behalf of herself, and also for the benefit of all the heirs-at-law and next of kin of the said deceased, who will come in and contribute to the expenses," against the personal representatives of the testator, to procure an adjudication upon the validity of his will, and to have a trust declared and established in favor of said heirs-at-law and next of kin as against the administrators with the will annexed and for equitable relief. (*Farnam* agt. *Barnum*, ante, 396.)
2. One next of kin may maintain an action of this character for the benefit of all. (*Id.*)
3. Where the question is one of a common or general interest of many persons, or where the persons who may be made parties are very numerous, it being impracticable to bring them all before the court, then one may sue for the benefit of all. The word "many" is not used in section 448 of the Code of Civil Procedure to express the idea of *very numerous* persons. There are two classes named, where one may sue for all. One is, where many persons have a common interest and another where the parties are so numerous that it is impracticable to bring them all before the court. While the word "many," as here used, contemplates more than one, it does not necessarily *very numerous* persons, while the word "many" as ordinarily used is synonymous in meaning with "numerous." As used in this section, in connection with the words "common or general interest of the persons," it means a limited number. It is the character of the interest which controls rather than the number of persons. The third class mentioned "very numerous," one is allowed to sue for all, as a matter of convenience in the administration of justice by the court. (*Id.*)
4. Actions against administrators, as well as actions against assignees for the benefit of creditors, brought to set aside an assignment, are exceptions to the rule that all parties having an equitable interest named by the decree, are necessary parties thereto. (*Id.*)
5. On a demurrer to a complaint the test of the unity of interest intended by the 448th section, is that the joint connection with or relation to the subject-matter, which by the established practice of the common law courts will preclude a separate action. (*Id.*)
6. The provisions of the constitution and by-laws of a benevolent society providing for the payment of sick or death benefits are in the nature of a contract, and the plaintiff must allege and prove a breach of said provisions before he can maintain an action. The question whether the action should be brought against the subordinate or grand lodge, considered. (*Eberle* agt. *Kaufeld*, ante, 488.)
7. Where a will presents upon its face questions of complication, uncertainty and difficulty, an executor may institute and maintain an action for the purpose of obtaining a judicial construction thereof, and for direction to him as to the manner in which he should discharge his duties in executing the will as such executor. (*Bigart* agt. *Jones*, ante, 491.)
8. Corporation — action by a stockholder against the corporation and directors, to restrain waste of its property — when a demand upon the corporation to bring the action need not be made. (*See Currier* agt. *N. Y., W. S. and B. R. Co.*, 35 *Hun*, 355.)
9. Statute of limitation — when an

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action will be treated as one to recover damages for personal injury resulting from negligence -- Code of Civil Procedure, section 383, subdivision 5. (*See Webber agt. Herkimer and Mohawk Street R. R. Co.*, 35 Hun, 44.)

10. Against a non-resident — when a defendant answering generally does not subject himself to the jurisdiction of the court. (*See Hamburger agt. Baker*, 35 Hun, 455.)

11. This action was brought by the plaintiff upon a promissory note made by the defendant to the order of and indorsed by one Terhune. The plaintiff was incorporated by a special act of the legislature of New Jersey. In 1877, on the petition of a stockholder and creditor, a receiver of its property was appointed, under a statute of that state which declares that when any corporation shall be dissolved the chancellor may appoint a receiver to take charge of the estate and effects of the corporation, and collect its debts and property due and belonging to it, with power to prosecute and defend, in the name of the corporation or otherwise, all such suits as may be necessary and proper for that purpose:

Held, that the complaint was properly dismissed upon the ground that the action was not prosecuted by the receiver, the real party in interest, as required by section 449 of the Code of Civil Procedure. (*Merchants' Loan and Trust Co. agt. Clair*, 36 Hun, 362.)

12. That the New Jersey statute, authorizing the receiver to bring an action in the name of the corporation, had no extra-territorial force. (*Id.*)

13. Right of an assignee of a foreign judgment to sue thereon in this state — when a stay granted in a foreign country is operative here.

(*See Nasro agt. McCalmont Oil Co.*, 36 Hun, 296.)

14. For money had and received — when it lies against a town for money collected on an invalid assessment. (*See Day agt. Town of New Lots*, 36 Hun, 263.)

ADDITIONAL ALLOWANCE.

1. In an action by a vendor to foreclose a land contract, in which the plaintiff recovers, he is not entitled to the additional allowance provided by section 3252 of the Code of Civil Procedure. (*Burkhart agt. Babcock, ante*, 512.)

AFFIDAVIT.

1. It is not necessary to state in the affidavit to obtain order for examination of a judgment debtor, in proceedings supplementary to execution, that the city court of New York is a court of record, that no previous application for an order to examine judgment debtor has been made in the action or that the judgment was rendered upon the judgment debtor's appearance or personal service of the summons upon him. (*Sayer agt. MacDonald, ante*, 119.)

See ATTACHMENT.

Doctor agt. Schnepf, ante, 52

AMENDMENT

1. The court may on the trial allow the pleadings to be amended by striking out the words "and son" in the title of the action and inserting in place thereof the name of the son. (*Bannerman agt. Quickenbush et al., ante*, 293.)

2. The defendants were sued as executors, and the complaint alleged and the answer admitted that they held the securities in their repre-

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sentative capacity. After the trial the complaint was amended, upon the plaintiff's motion, so as to make the action one against the defendants individually, and a judgment against them as individuals was entered: *Held*, that the court erred in allowing the amendment to be made. (*Van Cott* agt. *Prentice*, 35 *Hun*, 317.)

3. Execution against the person—irregularities in the recital—when amendable—stipulation not to sue for false arrest—power of the courts to compel a party to make it—Code of Civil Procedure, secs. 723, 1372, 1489. (*See Waller* agt. *Isaacs*, 36 *Hun*, 233.)
4. Service of summons by publication—when the order directing it may be subsequently amended. (*See Coffin* agt. *Lester*, 36 *Hun*, 347.)
5. It is within the power and discretion of a referee, on trial of an action, to allow an amendment of the complaint, which does not affect the issue upon determination of which plaintiff's right to relief depends, or which does not bring in a new cause of action; and his decision thereon is not reviewable here. (*Price* agt. *Brown*, 98 *N. Y.*, 383.)

ANSWER.

1. A denial in an answer "on information and belief of all the allegations in the complaint contained not hereinbefore admitted or denied and not containing the allegation that the defendant had not sufficient knowledge or information to form a belief as to the other statements in the complaint, and for that reason he denied them, does not put in issue a material allegation of the complaint, and all such allegations will be taken as admitted." (*Schroeder* agt. *Wanzor*, *ante*, 13.)

APPEAL.

1. A stay of proceedings should not be vacated pending appeal when such an appeal presents reasonable questions for review. (*Matter of Case* agt. *Campbell*, *ante*, 85.)
2. The court of appeals will entertain a motion to dismiss an appeal for which there is no foundation, without waiting until the case is reached in its regular order on the calendar. (*Stoughton* agt. *Lewis*, *ante*, 331.)
3. A plaintiff is not precluded from making a motion to dismiss an appeal taken by a defendant, because he (the plaintiff) has noticed the case for argument and placed it upon the calendar. He waives nothing by so doing. It is still optional with him to wait until the case is reached on the calendar, or to make his motion to dismiss on the ground that the appeal is unauthorized. (*Id.*)
4. Where, in an action to foreclose a mortgage, a complaint containing all the requisite allegations has been served upon defendant, who afterwards obtained a stipulation from plaintiff's attorney for further time to answer, agreeing not to put in any answer and not to ask any further extension of time. On the last day defendant served a demurrer which was, on motion, overruled and stricken out, and plaintiff proceeded as if no demurrer or answer had been interposed and obtained his judgment by default. The defendant appealed to the general term, where it was affirmed, and from the affirmance defendant appeals to this court:
Held, that, the demurrer having been overruled, the judgment went by default in the same manner as if no demurrer had been served, and no appeal is allowed from a judgment entered by default. The order overruling the demurrer not having been ap-

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- pealed from cannot be assailed on an appeal merely from the judgment. (*Id.*)
5. Review of a trial before a judge or referee — unless the case shows that it contains all the evidence bearing on a disputed finding of fact, the court will assume that there was evidence sufficient to sustain the finding — under the new Code no exception lies to a finding of fact, unless it be wholly unsupported by evidence — nor does any exception lie to a refusal to find a fact as requested. (*See Porter* agt. *Smith*, 35 *Hun*, 118.)
6. Additional allowance — when the general term will not reverse an order resting in the discretion of the court below — the amount involved may be considered in passing upon the application. (*See Gooding* agt. *Brown*, 35 *Hun*, 153.)
7. Trial by the court — findings of fact and conclusions of law must be made and signed — a trial of a contested question of fact by the court cannot be reviewed unless such a decision be made. (*See Benjamin* agt. *Allen*, 35 *Hun*, 115.)
8. When an order granting or refusing a new trial in an equity case is appealable — when an error will be disregarded — when the judgment will be reversed. (*See Bowen* agt. *Becht*, 35 *Hun*, 434.)
9. Will — the correctness of the adjudication admitting it to probate is only reviewable on appeal. (*See Wells* agt. *Stearns*, 35 *Hun*, 323.)
10. When a new trial may be had in a county court on appeal from a justice's judgment — Code Civil Procedure, section 3068. (*See Reynolds* agt. *Swick*, 35 *Hun*, 278.)
11. Not the remedy for an irregular entry of judgment. (*See Robinson* agt. *Hall*, 35 *Hun*, 214.)
12. Effect of an order directing that a judgment be marked suspended upon appeal. (*See Judgment.*)
13. Upon the application of the water commissioners of Amsterdam to acquire title to land, an order was made at a special term allowing them to amend their petition. By an independent provision contained in the order ten dollars costs of the motion were awarded to the respondents, landowners, who had resisted the application, not as a condition to the granting of the motion, but absolutely. The landowners having accepted the ten dollars costs which were tendered to them, appealed from the order: *Held*, that under the circumstances of this case the landowners did not, by accepting the costs, waive their right to appeal. (*Matter of Water Commissioners of Amsterdam*, 36 *Hun*, 534.)
14. The doctrine of waiver only applies in those cases where the appellant has attempted to enforce the order in his favor, or some part thereof connected with or dependent upon such other part as he seeks to avoid by his appeal, or in which he has accepted a benefit having such connection or dependency. (*Id.*)
15. An order of a county court, denying a motion for a new trial upon the ground of surprise and newly discovered evidence, is addressed to the discretion of that court, and is not reviewable upon appeal by the general term of the supreme court. (*Myers* agt. *Riley*, 36 *Hun*, 20.)
16. The supreme court has no power to review the exercise by the county court of a discretionary power vested in the latter court. (*Id.*)
17. Where upon an appeal from a judgment, entered upon the verdict of a jury, and from an order

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- denying a new trial, it does not appear that the case contains all of the evidence, questions of fact or errors of the jury cannot be considered. (*Cornish agt. Graff*, 36 Hun, 160.)
18. When a case is settled and filed, after entry of judgment, the judge, referee or court should make an order directing the case to be annexed to the judgment-roll. (*Id.*)
19. Examination of a person having property belonging to the estate of a deceased person — all the executors or administrators should be parties to the proceeding — Code of Civil Procedure, section 2706 — an order denying a motion to dismiss the proceeding is appealable. (*See Mutter of Slingerland*, 36 Hun, 575.)
20. Review on appeal of a decision of the special term in proceedings to correct an erroneous assessment — 1890, chapter 269 — how objections to the reception of evidence should be stated — erroneous admission of evidence — when the decision will not be reversed therefor. (*See People ex rel. Railroad agt. Keator*, 36 Hun, 592.)
21. County court — orders resting in its discretion are not reviewable at general term. (*See Kugelman agt. Rhodes*, 36 Hun, 269.)
22. Right to review on appeal challenges to jurors — Code Criminal Procedure, section 455, sub. 2; 1873, chapter 427. (*See People agt. Willett*, 36 Hun, 500.)
23. Where, in pursuance of an order of the supreme court confirming the award of commissioners in proceedings under the general railroad act (*chap. 140, Laws of 1850*), to condemn lands belonging to the city of New York for railroad purposes, the railroad company paid over the sum awarded to the city chamberlain, who receipted therefor: *Held*, that at least in the absence of evidence that the city had used, or in some way interfered with the money, such payment and receipt did not deprive the city of its right to appeal from the order. (*In re N. Y. and H. R. R. Co.*, 98 N. Y., 12.)
24. It seems that under said act (*sec. 18*) a landowner does not waive his right to appeal from an order confirming an award by receiving the sum awarded: the effect of the payment or deposit, as directed by the order of the sum awarded, is to divest the landowner of all interest in the land as well as the use thereof during the existence of the railroad corporation, but it does not deprive either party of the right to appeal. (*Id.*)
25. An order of general term reversing an order which confirmed an award and directing a new appraisal is not reviewable here. (*Id.*)
26. Where upon trial exceptions are, without objection, ordered to be heard at first instance at general term, the party succeeding at general term may not object to a review of its decision here, on the ground that the case was not one proper to be so heard. (*Wyckoff agt. DeGraaf*, 98 N. Y., 134.)
27. In an action for partition, O., the holder of a mortgage on the premises, was made a party defendant; the lien of his mortgage being questioned, he answered, alleging it to be a valid and subsisting lien, and asked that the premises be declared subject thereto, or that it be paid out of the proceeds of sale if a sale is decreed. O. appeared and took part in the trial. An interlocutory judgment was rendered, adjudging that the mortgage was not a valid lien: *Held*, that as O. had, without objection, thus submitted his rights to the court, and sought to have them enforced, conceding he could not have been compelled thus to litigate.

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- gate them (as to which *quare*), he could not raise the objection on appeal; and this, although he asked the trial court to find as a conclusion of law that no affirmative relief could be given against him in that form of action. (*Barnard* agt. *Onderdonk*, 98 N. Y., 158.)
28. This court, on appeal in criminal actions, may not consider objections to portions of the charge as to which no exceptions were taken on the trial. (*People* agt. *Mills*, 98 N. Y., 176.)
29. The surrogate refused probate of a will contested on the ground of undue influence; he found all the facts in favor of the proponent, save as to undue influence; there was no evidence to establish this: *Held*, that it was proper for the general term, on appeal from the surrogate's decision, to direct judgment admitting the will to probate. (*In re Martin*, 98 N. Y., 193.)
30. The reversal of the surrogate's decree in such case is upon a question of law, and so the provision of the Code of Civil Procedure (sec. 2589), requiring where the reversal is upon a question of fact, that a jury trial shall be ordered, does not apply. (*Id.*)
31. Also *held*, that the case required an exercise of the power conferred by the Code (sec. 2589), to impose costs upon the unsuccessful party. (*Id.*)
32. The validity of an undertaking given under the Code of Procedure (sec. 848), for the purpose of staying proceedings on appeal to the general term of the supreme court, depends upon its efficacy in securing to the appellant the stay desired; where the obligee elects to treat it as invalid, and is permitted by the court to proceed and collect his judgment in disregard thereof, he cannot afterward maintain an action and hold the obligors liable thereon. (*Hemmingway* agt. *Poucher*, 98 N. Y., 281.)
33. It is within the power and discretion of a referee, on trial of an action, to allow an amendment of the complaint, which does not affect the issue upon determination of which plaintiff's right to relief depends, or which does not bring in a new cause of action; and his decision thereon is not reviewable here. (*Price* agt. *Brown*, 98 N. Y., 388.)
34. Where improper evidence has been received under objection and exception, which subsequently, on motion of the party against whom it was offered, is stricken out, this is to be deemed an abandonment of the exception, and such party may not have the benefit of it on appeal. (*Id.*)
35. The act of 1881 (*chap.* 486, *Laws of 1881*), "to facilitate the giving of bonds required by law," does not repeal or affect the provision of the Code of Civil Procedure (sec. 1334), requiring two sureties to an undertaking on an appeal to this court. (*Nichols* agt. *MacLean*, 98 N. Y., 458.)
36. The appellant himself may not sign as surety. (*Id.*)
37. It is not a ground for dismissal of appeal that the appellant has failed to notice the case for argument and place it on the calendar; he is bound only to file the return and serve the printed cases; if the respondent wishes to expedite it, he may notice. (*Id.*)
38. The practice of referring in an answer to parts of the complaint which the pleader intends to admit or deny, as "at" or "between" certain folios, does not conform to the spirit of the provision of the Code of Civil Procedure (sec. 22), which requires pleadings to be made out "in words at length and

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not abbreviated," and serves no useful purpose on appeal where original folios do not appear in the case. (*Caulkins* agt. *Bolton*, 98 N. Y., 511.)

39. The general term of the court of common pleas of the city of New York, on appeal to it from a judgment of the general term of the city court (late marine court), affirmed the judgment and granted leave to the appellant to appeal to this court from the judgment to be entered on its decision. An order of affirmance was entered in the court of common pleas, and thereafter, a judgment was entered in the city court, which recited that a remittitur had been sent down from the court of common pleas, and made the judgment of that court the judgment of the city court. The appellant served a notice of appeal "from the judgment entered in the office of the clerk of the city court," without referring to the judgment or order of the common pleas: *Held*, that the appeal was improperly taken; that no appeal lies to this court from a judgment of the city court. (*Ansonia B. and C. Co.* agt. *Conner*, 98 N. Y., 574.)
40. The appeal should have been from the determination of the court of common pleas. (*Id.*)
41. Where a judgment is affirmed in this court without an opinion, and without formally adopting the opinion below, it is not to be understood that the affirmance is upon grounds substantially different from those taken below; on the contrary, the inference is the other way, as in case of such a difference the court would deem it proper to state the reason for affirmance. (*Higgins* agt. *Crichton*, 98 N. Y., 626.)
42. In an action upon a promissory note the answer was a general denial. Plaintiff gave evidence on the trial sufficient to establish

prima facie the execution of the note by the alleged maker. Defendant gave in evidence certain letters written by plaintiff to the maker, and at the close of the case asked the court "to direct a verdict for defendant in view of those letters." The request was denied. Upon appeal defendant sought to sustain his exception to the ruling on the ground that the letters "showed the note to be without consideration:" *Held*, that defendant, to avail himself of this point, should have called the attention of the trial court to it, and, having failed to do so, could not raise it on appeal. (*Langley* agt. *Wadsworth*, 99 N. Y., 61.)

43. So far as the cross-examination of a witness relates to facts in issue, or relevant facts, it may be pursued by counsel as matter of right but when the object is to test the accuracy or credibility of the witness, its method and duration are subject to the discretion of the court, and the exercise of this discretion, unless it is abused, is not the subject of review. (*Id.*)
44. Where the decree of a surrogate settling the accounts of an executor is, on appeal to the general term, reversed, so far as it charges the executor with certain items, on the ground that he is not properly chargeable therewith, and the decree is remitted to the surrogate for resettlement in accordance with the decision of the general term, its judgment is final so far as relates to any judicial action, and so is appealable to this court. (*Stimson* agt. *Vroman*, 99 N. Y., 74.)
45. *It seems* that where the findings of a trial court are apparently inconsistent, it is the duty of the appellate court, if possible, to reconcile them and give effect to the real meaning and intent of the court in making them. (*Health Department* agt. *Purdon*, 99 N. Y., 237.)

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46. Although on appeal from a judgment, in an action tried by the court, no exceptions appear to the findings of fact, or error in their determination, but the general term draws a different legal conclusion therefrom than that of the trial court, this does not authorize it to render a final judgment in accordance with its own conclusion. Whenever the character of the issues framed by the pleading is such that, upon a new trial, it will be possible for the respondent to recover, a new trial should be ordered. Having succeeded on the trial, he is not required to procure the appearance of exceptions upon the record, and so the appellate court cannot determine that there were no exceptions or errors. (*Thomas* agt. *N. Y. L. Ins. Co.*, 99 *N. Y.*, 250.)
47. In proceedings under the general railroad act (*sec. 22, chap. 140, Laws of 1850*) by an aggrieved landowner to procure a change of the proposed route of a railroad, an appeal to this court does not lie to review questions of fact passed upon by commissioners after hearing testimony and personally inspecting the *locus in quo*. (*In re N. Y., L. E. and W. R. R. Co.*, 99 *N. Y.*, 388.)
48. As to whether an order in such a proceeding is in any case reviewable here, *quære*. (*Id.*)
49. A court having power to, and which appoints a receiver of the assets of an insolvent corporation, may, in aid of that appointment, forbid any after interference, by way of levy and seizure by attachment or execution, with the property in his possession. (*Woerishoffer* agt. *N. R. Con. Co.*, 99 *N. Y.*, 398.)
50. The exercise of the right to restrain such interference being in the discretion of the court, its determination is not reviewable here. (*Id.*)
51. Where a former judgment between the parties is not pleaded as an estoppel or given in evidence on the trial, its effect as bearing upon the facts in issue may not be considered on appeal. (*Hebrew F. S. Assn.* agt. *Mayor, &c.*, 99 *N. Y.*, 488.)
52. The judge to whom application is made under the general assignment act (*chap. 466, Laws of 1877*) for examination of witnesses before a referee has a discretion in the matter, and unless an abuse of this discretion appears, his decision may not be reviewed on appeal. (*In re Holbrook*, 99 *N. Y.*, 539.)
53. When an order of general term, reversing a judgment of conviction in a criminal action, omits to show that the court exercised its discretion and refused a new trial upon the facts and granted it only for error of law, it is not reviewable here. (*People* agt. *Poucher*, 99 *N. Y.*, 610.)
54. Where objection as to form of verdict not taken on trial may not be raised on appeal. (*See Briggs* agt. *Hilton*, 99 *N. Y.*, 517.)
55. When surety in undertaking on appeal becomes insolvent, respondent entitled to a new undertaking. (*See Mahon* agt. *Noon* [*Mem.*], 99 *N. Y.*, 625.)
56. Where party has sufficient remedy at law against a public officer, court not absolutely bound to grant a writ of *mandamus*, but may, in its discretion, refuse, and this discretion not reviewable here. (*See People ex rel.* agt. *Thompson* [*Mem.*], 99 *N. Y.*, 641.)

APPEARANCE.

1. The defendant corporation in this case, although it had not been served with a copy of the summons and complaint, moved, with-

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out serving any formal notice of appearance, to have the complaint made more definite and certain. Thereupon the plaintiff procured an *ex parte* order discontinuing the action as to the corporate defendant: *Held*, that this was proper; that the service of the notice of motion was not equivalent to an appearance. (*Valentine* agt. *Myers' Sanitary Depot*, 86 Hun, 201.)

2. Under section 421 of the Code of Civil Procedure, a defendant can only appear by serving a notice of appearance or a copy of a demurrer or answer. (*Id.*)

ARREST.

1. Where the petitioner was arrested for converting to his own use moneys and securities belonging to the plaintiff, while acting in a fiduciary capacity, and was imprisoned in default of bail, and on his application for a discharge his examination showed that in violation of his trust he had used the money and property for his own benefit:

Held, that he was entitled to his discharge, because it did not appear that he had disposed or made over any part of his *own* property, with a view to the future benefit of himself or his family, or with intent to injure or defraud any of his creditors. (*Matter of Caamano*, ante, 240.)

2. Proof that one of two partners withdrew a large amount of money from the business of the firm for the reason that it had suffered severe losses, and that the other partner had already transferred a large portion of his property to his wife without consideration, will not support an order of arrest against the partner who withdrew the money, without further proof that he had either disposed of any part of this sum or intended to do so to defraud his

creditors. (*Scott and others* agt. *Reed*, ante, 521.)

ASSESSMENTS.

1. Although in determining the value of railroad or canal property, for the purposes of taxation, the cost of creating it may be considered, yet its earning capacity should be the more controlling consideration or test. (*People ex rel. Pres., &c., of D. and H. Canal Co.* agt. *Roosa and others*, ante, 454.)

ASSIGNEE.

1. In a proceeding for removal of an assignee who has misconducted himself, where there are three assignors, one of whom has left the state, notice to one assignor is properly notice to all; though the better course would be to give the statutory five days' notice to the two within the state, in the ordinary way and to serve the absent assignor by depositing a notice in the post-office, addressed to him at his last known place of residence giving double the time. (*Matter of Cohen & Company*, ante, 523.)

ASSIGNMENT.

1. A surviving partner has no power without the consent and concurrence of the representatives of the deceased partners to make an assignment to a trustee for the benefit of creditors of the firm, and to create preferences among the creditors by such an assignment; and the attempt to do that is such an abuse of the surviving partner's powers as justifies the representatives of the deceased partner in applying to a court of equity to take possession of the estate by a receiver. (*Nelson* agt. *Tenney*, ante, 272.)
2. Stock purchased on margin by a

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stock-broker for a customer, becomes the property of the customer, as between them the relation of pledgor and pledgee is created and exists, and upon payment of the amount due the customer becomes entitled to the possession of the stock. (*Matter of Smyth, ante, 481.*)

3. Nothing passes by a general assignment except the interest of the assignor, and if any of the assigned property is freighted with equities the assignee must recognize the same. (*Id.*)

4. Trust funds do not pass to an assignee of an insolvent, and they may be followed into the hands of such assignee for the benefit of the *cestui que trust*. (*Id.*)

5. Funds wrongfully appropriated may be followed into any property the wrong-doer may have invested them. (*Id.*)

6. Rules stated for tracing trust funds. (*Id.*)

7. If the fund in the hands of an assignee of an insolvent has been increased by reason of an appropriation by other parties having a lien upon both, of one of two classes of securities, the assignee is liable to the claimant whose property was appropriated to the extent of the increase. General creditors cannot get on an equality with those having superior claims through any action of a prior lienor. (*Id.*)

See CREDITOR'S ACTION.

Iselin et al. agt. Henlein et al., ante, 211.

ATTACHMENT.

1. An affidavit for an attachment made by H. states as follows: "I am a member of the firm of D. & Co., and one of the plaintiffs above-named, the only plaintiffs

so above-named being D. and himself, it is a fair presumption that they constitute the firm." (*Doctor agt. Schnepf, ante, 52.*)

2. It is to be presumed that if counter-claims existed in favor of the defendant, that some knowledge of that fact would have been possessed by the plaintiff H. making the affidavit. For the purposes of the statute his knowledge constituted that which was known to the plaintiffs, and his allegation is a substantial compliance therewith. (*Id.*)

3. An affidavit by B. which states that he was the bookkeeper of the plaintiffs and personally acquainted with the defendant; that the defendant had in his possession several statements showing a balance due to the plaintiffs for the goods sold and delivered to him, and that he had frequently acknowledged to the affiant his indebtedness to the plaintiffs for the amount claimed, is sufficient to show the existence of a cause of action in favor of the plaintiffs against the defendant. (*Id.*)

4. An affidavit by B., which states that "a short time ago he (defendant) represented himself to be a man of means," clearly indicates that he had arrived at mature years and that he was an adult, and is a sufficient compliance with subdivision 5 of section 3169 of the Code of Civil Procedure. (*Id.*)

5. The provision of section 709 of the Code of Civil Procedure permitting the sheriff to hold property taken under an attachment after the warrant of attachment has been vacated on the application of defendant, until his costs and expenses have been paid, and sell it for their payment, is unconstitutional, as being in effect to allow him to hold and dispose of the property of one party to pay the debt exclusively of another

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(See *Hall* agt. *United States Reflector Company*, 66 *How.*, 51). (*Bowe* agt. *United States Reflector Company and others*, ante, 440.)

6. An attachment against the property of the defendants was granted, upon the application of the plaintiff, on the ground that the defendants had fraudulently disposed of their property with intent to defraud their creditors. The affidavit upon which it was issued was made by one Snow, the vice-president, and a director of the plaintiff, a national bank. It stated "that the plaintiff, the Marine National Bank, is, as deponent is informed and verily believes, entitled to recover of the defendants * * * the said sum of \$7,000, over and above all counter-claims known to the plaintiff or to deponent." *Held*, that it was fatally defective in failing to show that the plaintiff was entitled to recover the sum stated therein, over and above all counter-claims known to it, as required by section 636 of the Code of Civil Procedure. (*Marine Nat. Bank of N. Y.* agt. *Ward*, 35 *Hun*, 395.)
7. Although such an affidavit may be made by an agent of the plaintiff where the facts are within his personal knowledge or where the facts upon which his information and belief are based are disclosed by the affidavit, and are such as to show satisfactorily that the plaintiff is entitled to recover the sum named, over and above all counter-claims known to the plaintiff and the affiant, yet it is not sufficient, where the agent or officer makes such statement upon information and belief, without showing whence and from whom the information was derived, and why the affidavit of his informant was not produced. (*Id.*)
8. The allegations in this affidavit, all of which were made upon information and belief, were also held to be insufficient to show that the defendants had fraudulently disposed of any of their property with intent to defraud their creditors. (*Id.*)
9. The affidavit which section 636 of the Code of Civil Procedure requires the plaintiff to furnish on applying for an attachment, need not be made by the plaintiff himself but may be made by an agent. (*Gibbon* agt. *Buck*, 35 *Hun*, 541.)
10. The fact that the amount claimed is due to the plaintiff, over and above all counter-claims known to him, may be established by an affidavit of the agent, where it appears from his affidavit that the plaintiffs, who reside in Great Britain, had no personal connection with the transaction set forth, and that the agent personally sold and delivered the goods. (*Id.*)
11. The first cause of action set forth in the complaint in this action was to recover damages occasioned by the sale of goods, which was induced by the false and fraudulent representations of the defendant. The second cause of action alleged that the defendant purchased the goods when insolvent, and with the intent to cheat and defraud the plaintiff, and not pay for them. It then alleged that the defendant had converted the goods to his own use to the plaintiff's damage: *Held*, that the complaint set forth a cause of action for the "wrongful conversion of personal property," within the meaning of subdivision 2 of section 635 of the Code of Civil Procedure, and that the action was one in which an attachment might issue. (*Gladke* agt. *Maschke*, 35 *Hun*, 476.)
12. Under an attachment issued in an action brought by one Hall against the defendants, the sheriff seized certain articles of personal property belonging to them, and

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- held the same until an order was made setting aside and vacating the attachment, because of the failure of the plaintiff in that action to increase the security given by him therein. The sheriff, claiming to be entitled, under section 709 of the Code of Civil Procedure, to retain the property until all his legal costs, charges and expenses had been paid, refused to deliver the same to the defendants, and brought this action to have a lien thereon to that extent adjudged to exist in his favor, and to have the property sold to satisfy the same: *Held*, that in so far as the said section of the Code attempts to compel a defendant to pay the costs, charges and expenses incurred by the sheriff in levying upon his property under an attachment issued in an action brought by a third person in a case in which such attachment has been subsequently vacated and set aside, it is unconstitutional and void, as depriving the defendant of his property without due process of law. (*Bowce* agt. *U. S. Reflector Co.*, 88 *Hun*, 407.)
13. At the time the property was taken it was agreed between the sheriff and the defendant that it should remain in the store in which it then was, and that the sheriff should pay the rent for the store, and that the amount so paid should be treated as expenses incurred by him in enforcing the attachment: *Held*, that to the extent of the rent so paid the sheriff was entitled to a lien upon the property. (*Id.*)
14. The certification of a check drawn upon a bank by the owner of a fund on deposit therein does not, while the check is outstanding in the hands of the drawer, exempt the fund from the lien of an attachment against him, levied thereon. (*Gibson* agt. *National Park Bk.*, 98 *N. Y.*, 87.)
15. The liability of the bank for failure to hold the fund subject to the lien can be defeated only by showing either a payment of the check in good faith to a *bona fide* holder, or that it was outstanding in the hands of such a holder. (*Id.*)
16. Where a debt has been legally attached, in an action against the creditor an active duty is imposed upon the debtor, and he is liable, when by inaction he allows the attached fund to be removed from his possession. (*Id.*)
17. When, however, a negotiable security, representing the amount of a debt, has been delivered by a debtor to his creditor, it is essential to a recovery of such debt by an attaching creditor, that he obtain possession and return the security to its maker, on or before trial, or show that it was paid in bad faith and is then in the possession of the maker. (*Id.*)
18. Defendants, in response to a demand by an officer holding an attachment for a certificate of the property and credits of the attachment debtors in their hands, delivered an account current showing a balance to the credit of said debtors. In an action by the attachment creditors wherein they sought to recover an amount in excess of the balance so shown: *Held*, that the only essential part of the account was that showing the balance; that while the items therein might be taken as admissions against defendants, they were not estopped thereby, but the same were open for explanation. (*Almy* agt. *Thurber*, 99 *N. Y.*, 407.)

ATTORNEY AND CLIENT.

1. B. being the attorney and agent of the mortgagee, as such, so long as he had the bond and mortgage in his possession is authorized to receive the interest accruing thereon, and the mortgagor is

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- safe in paying the same to him. But the possession of these papers alone gives him no authority to receive a part of the principal sum secured by the mortgage before it was due. (*Crane* agt. *Evans*, ante, 310.)
2. A mortgagor who pays interest or principal upon a mortgage to any one other than the mortgagee himself, when the person receiving the moneys has not in his possession the obligation, does so at his peril. In order to hold the principal to such payment he must be prepared to prove express authority. (*Id.*)
 3. Persons employed as attorneys and counselors to perform services for others must be reasonably well informed of the legal principles applicable to and governing the disposition of the business committed to their charge; and when they fail to inform themselves of statutory provisions or well settled principles of law readily accessible by means of ordinary care and attention, and in consequence thereof the business committed to them is mismanaged, and the persons employing them are deprived of their legal rights, they will not only forfeit all legal claim for compensation, but in addition be justly held responsible for any loss or injury sustained by means of such misconduct by the person or persons for whom they may be employed. (*Carter* agt. *Talcott*, ante, 352.)
 4. An attorney who is employed to defend two actions arising out of the same contract, and sets up the same counter-claim, consisting of an indivisible demand as a defense in both actions, and upon the trial of the first action withdraws the counter-claim, except so much thereof as is necessary to extinguish plaintiff's demand, and thereby deprives defendant of the benefits of the remainder of the counter-claim upon the trial of the second action, is not entitled to compensation for the services so rendered. (*Id.*)
 5. An attorney who appeals from an order referring an action involving a long account with a view of taking the appeal to the supreme court of the United States, on the ground that the order violated the provisions of the Constitution of the United States requiring jury trials, is not entitled to compensation for the services rendered on such appeal and is liable to indemnify his client against the expenses to which he was subjected in prosecuting it. (*Id.*)
 6. Upon the hearing of an application for an order to compel an attorney to pay over to his client money which he had received for the purpose of investment, it appeared that the client had, prior to instituting such proceedings, commenced an action against the attorney in which she had caused him to be arrested, and that the said action was still pending: *Held*, that the pendency of this action furnished a sufficient ground for denying the application. (*Matter of Mott*, 36 Hun, 569.)

ATTORNEY'S LIEN.

1. The taxable costs in an action are not subject to set-off. (*Turno* agt. *Parks et al.*, ante, 35.)
2. An attorney has a lien for his services in a particular case, as a mechanic would upon the product of his labor, and equity intervenes to save it for him, but this lien would ordinarily be measured by his taxable costs, but might embrace a further fee, and will not always be limited to such costs if a special contract had been made in good faith between the client and his attorney, but, *it seems*, it must refer to his services in the particular action. (*Id.*)

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3. Where prior to the recovery of the judgment the plaintiff assigned to his attorney herein all his interest in the cause of action in payment for services in the suit of *Parks* agt. *Turno*, and also for money loaned, and the attorney held this assignment prior to the recovery of judgment, and due notice was given the defendants:

Held, that the equity of the attorney is superior to that of the plaintiff, and no right of set-off exists. (*Id.*)

4. The lien of an attorney attaches to the cause of action; but if the client has no cause of action at the time of suit brought, there is nothing to which the lien attaches unless it be the papers in the case. (*Kipp* agt. *Rupp et al.*, ante, 169.)

5. If a judgment be recovered wholly for costs, it belongs to the attorney, who is regarded as the equitable assignee thereof, and he may prosecute in his own name the undertaking given to secure its payment. (*Id.*)

6. When the plaintiff in an action, after recovering judgment therein, assigned his cause of action, &c., to one "P.," and the action was thereafter continued in the name of the original plaintiff, and a judgment for costs in his favor recovered in the court of appeals, which he also assigned to said "P.," and thereafter an action was brought in the name and with the consent of the original plaintiff by his attorney, who was the attorney of record for the respondent on said appeal, to recover from the sureties on appeal the amount of said judgment:

Held, that the action could not be maintained; that the attorney, being the equitable owner of the judgment, should have brought the action in his own name. (*Id.*)

7. In such a case, the fact that the attorney obtained an order, after issue joined, permitting him to

prosecute the action for the enforcement of his lien, did not alter the legal status of the parties to the action, or vest in the plaintiff a cause of action. (*Id.*)

See SUPPLEMENTARY PROCEEDINGS.
Moore agt. *Taylor and another*, ante, 848.

BAR.

1. Condonation of adultery by subsequent cohabitation with knowledge does not bar an after-brought action for divorce predicated on such adultery, where the condonation is upon the promise by the guilty party (the husband) that he would in all things thereafter treat his wife kindly and in a proper manner, and would be in all things a good and affectionate husband to her, when such promise has been violated. (*Timerson* agt. *Timerson*, ante, 526.)

BENEVOLENT SOCIETY.

1. The provisions of the constitution and by-laws of a benevolent society providing for the payment of sick or death benefits are in the nature of a contract, and the plaintiff must allege and prove a breach of said provisions before he can maintain an action. The question whether the action should be brought against the subordinate or grand lodge, considered. (*Eberle* agt. *Kauffeld*, ante, 488.)

BOOKS AND PAPERS.

1. A person who takes proceedings under the Revised Statutes, to compel the delivery by another to him of the books and papers of an office, should at least show a *prima facie* title to the office, and this would be properly proved by the official canvass showing claimant to have received the greatest

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- number of votes. (*Matter of Case* : *gt. Campbell*, ante, 85.)
2. Such proceedings to compel the delivery of books, &c., are not to be used to try the title to an office; and when the result of an election is declared by the official canvassers, a county judge has no power, upon such an application, to take evidence and determine the result of an election. (*Id.*)
 3. It is only in a clear case, or in one free from reasonable doubt, that the authority conferred upon the court by the Revised Statutes to compel the delivery of books and papers in the possession of one officer to the custody of another will be exercised. The remedy is only given where the case is so clear that the conduct of the party, in refusing to deliver, could be called *willful* or *obstinate*, and not in a case in which a person in *good faith* holds possession of an office supposing himself to be its lawful incumbent, and with that possession the custody of books and papers essential to the proper discharge of its duties. (*Bridgman* agt. *Hall*, ante, 173.)
 4. Do the provisions of the Revised Statutes under which this proceeding is instituted apply to the office — chamberlain or treasurer of a municipal corporation created by special charter — which each of the parties to this proceeding claim to be entitled to? *Quære?* (*Id.*)
- the true facts. (*Bannerman* agt. *Quackenbush et al.*, ante, 293.)
2. The distinction between brokers and factors and their rights and liabilities, considered. (*Id.*)
 3. Perhaps, in the case put, the true owner might reclaim his goods from the vendee, if the right to do so is exercised within a reasonable time. But the right may be lost by delay or by bringing an action to recover the price. (*Id.*)

CEMETERY LOTS.

1. Where it appeared that a certain lot in Greenwood cemetery was purchased by the husband of the plaintiff as a burial lot for herself, her husband and their family, and that it had been greatly improved, not only at his but at her expense, and their family dead had been placed in the lot as their final resting place:
Held, that these facts were sufficient to disable the husband from afterwards conveying it away to another person, and thereby devoting it to a distinct and different purpose. The plaintiff had become so far interested in the property by its improvement, and the interment of her parents as to prevent her husband from making a legal or valid sale of it. (*Schroeder* agt. *Wanzor*, ante, 13.)
2. The case of *Thompson* agt. *Hickey* (8 Abb. N. C., 159; *opinion* by VAN VORST, J.) cited with approval. (*Id.*)

BROKERS AND FACTORS.

1. Where a broker has possession of goods to be sold, and sells them in his own name, he is a factor, and any offset existing against the latter may be set up to a claim made by the true owner of the property to recover the contract-price, provided the vendee purchased in good faith and without notice of

CITY COURT OF NEW YORK.

1. In examinations in supplementary proceedings in the city court, where it appears that the judgment debtor has made a general assignment for the benefit of his creditors, the examination need not be limited to property acquired

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since the assignment. (*Schneider et al* agt. *Altman*, ante, 448.)

2. Where a judgment was recovered and entered in the city court of New York and execution issued thereon for more than \$2,000., and the excess was remitted and the judgment and execution was amended *nunc pro tunc*. On motion by a subsequent execution creditor to vacate the judgment and execution for want of jurisdiction and other alleged defects and irregularities:

Held, that the jurisdiction of this court extends to any action wherein the complaint demands judgment for a sum of money only, whatever may be the amount claimed. The amount claimed does not affect the jurisdiction of this court. If jurisdiction vests at the commencement of the action, it cannot be ousted by any subsequent act, although entry of judgment for the excess of its jurisdiction may have been an irregularity which the defendant might have objected to, a third party cannot. (*Roof* agt. *Meyer*, ante, 20.)

3. There being no want of jurisdiction, if there are any defects or irregularities in the judgment, or proceedings or execution, they can be taken advantage of only by the defendant. (*Id*)

CITY MARSHAL.

1. The sureties on the official bond of a city marshal are not liable until after a valid judgment has been recovered against their principal. (*In re Mary Brasser*, ante, 154.)

CIVIL SERVICE.

1. By section 2 of chapter 410 of the Laws of 1881, it is the duty of the mayor of each city to pre-

scribe such regulations for the admission of persons into the civil service of such city; and to carry out the design and intention of the law it was provided that the mayor *shall*, from time to time, employ suitable persons to conduct such inquiries and make examinations; and the power to employ includes the obligation to provide for their compensation. (*The People ex rel. Wrig't* agt. *Common Council of Buffalo*, ante, 61.)

2. Where, under the charter of the city of Buffalo, the mayor made the estimate for what he considered would be the necessary expenses of carrying these provisions of the laws of the state into execution, and communicated and presented such estimate to the common council:

Held, that the common council had no power to wholly reject such estimate. Although it may alter or amend the estimate, it has no authority to arbitrarily reject it. Its duty is to consider it in good faith, with sound judgment and discretion; and if any misapprehension has intervened in its amount, to correct it and apportion it to the probable necessities of the service. (*Id*.)

3. A writ of *mandamus* is the appropriate remedy by which the common council may be required to consider the estimate and vote the amount thought necessary to carry out the law. (*Id*.)

4. A citizen and a taxpayer has the power and right to apply for the writ. (*Id*.)

5. It is only when the application for the writ is made to secure some personal or private redress that the applicant must be shown to be interested in obtaining it before the writ can be directed to issue. Where the act omitted to be performed affects the public interests generally, and all citi-

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zens are equally concerned in securing its performance, and that has been enjoined by a law of the state, it is sufficient, to support the application, that the applicant is a citizen and entitled to insist upon the execution of the laws of the state. (*Id.*)

CODE OF CIVIL PROCEDURE.

1. Section 8, sub. 3 — Contempt of court — when the failure of a defendant to comply with the directions of a final judgment, cannot be treated as a contempt — Code of Civil Procedure, secs. 1773, 1769, 1241, sub. 2 — "mandate," meaning of. (*See Jacquin agt. Jacquin*, 36 Hun, 378.)
2. Section 8, sub. 5 — Contempt — the refusal of a witness to answer questions may be punished either criminally or civilly — Code of Civil Procedure, sec. 8, sub. 5; sec. 14, sub. 5; sec. 2285 — length of the confinement — form of the commitment. (*See People ex rel. Jones agt. Davidson*, 35 Hun, 471.)
3. Section 14, sub. 5 — Contempt — the refusal of a witness to answer questions may be punished either criminally or civilly — Code of Civil Procedure, sec. 8, sub. 5; sec. 2285 — length of the confinement — form of the commitment. (*See People ex rel. Jones agt. Davidson*, 35 Hun, 471.)
4. Section 22 — The practice of referring in an answer to parts of the complaint which the pleader intends to admit or deny, as "at" or "between" certain folios, does not conform to the spirit of the provision of this section of the Code of Civil Procedure, which requires pleadings to be made out "in words at length and not abbreviated," and serves no useful purpose on appeal where original folios do not appear in the case. (*Caulkins agt. Bolton et al.*, 98 N. Y., 511.)
5. Section 66 — Where orders were granted for the examination of a judgment debtor on proceedings supplementary to execution, upon affidavits in the usual form made by one of the attorneys who recovered the judgments for the plaintiff. On motion by the judgment debtor to vacate such orders upon the ground that prior to the granting of the orders the title to the judgments had passed to a receiver:
Held, that the judgment debtor had the right to make such motion.
Held, further, that an attorney must obtain leave of the court before he can institute supplementary proceedings upon a judgment in favor of his own client after the title to that judgment has passed from the client to the receiver, and especially where the proceedings are instituted by an affidavit that says nothing about the lien of the attorney. (*Moore agt. Taylor*, ante, 343.)
6. Sections 66, 440 — The lien of an attorney attaches to the cause of action; but if the client had no cause of action at the time of suit brought, there is nothing to which the lien attaches unless it be the papers in the case.
 If a judgment be recovered wholly for costs, it belongs to the attorney, who is regarded as the equitable assignee thereof, and he may prosecute in his own name the undertaking given to secure its payment. (*Kipp agt. Rapp et al.*, ante, 169.)
7. Section 191 — In an action not founded upon contract, the sum for which the complaint demands judgment is deemed to be the amount of the matter in controversy within the meaning of this section. (*Zoeller agt. Riley*, 98 N. Y., 668.)
8. Section 315 — Where a judgment was recovered and entered in the city court of New York and execution issued thereon for more

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than \$3,000, and the excess was remitted and the judgment and execution was amended *nunc pro tunc*. On motion by a subsequent execution creditor to vacate the judgment and execution for want of jurisdiction and other alleged defects and irregularities:

Held, that the jurisdiction of this court extends to any action wherein the complaint demands judgment for a sum of money only, whatever may be the amount claimed. The amount claimed does not affect the jurisdiction of this court. If jurisdiction vests at the commencement of the action, it cannot be ousted by any subsequent act, although entry of judgment for the excess of its jurisdiction may have been an irregularity which the defendant might have objected to, a third party cannot.

There being no want of jurisdiction, if there are any defects or irregularities in the judgment, or proceedings or execution, they can be taken advantage of only by the defendant. (*Roof* agt. *Meyer*, ante, 20.)

9. Sections 376, 381 — After a judgment of foreclosure and sale, the owner of the equity of redemption executed another mortgage upon the premises as collateral to the judgment. *Held*, conceding that by stipulations in said mortgage enforcement of the judgment by sale was stayed for ten years, after the lapse of the ten years, and of twenty years thereafter, the lien of the judgment and of the new mortgage were lost and the enforcement of either was barred; and this, whether the question was considered under the limitation prescribed by the Revised Statutes (2 R. S., 295, sec. 90), or the Code of Procedure (sec. 90), or the Code of Civil Procedure (Sec. 381.)

Also *held*, that neither the provision of the Revised Statutes (2 R. S., 301, sec. 47), nor that of the Code of Civil Procedure (sec. 376),

raising a presumption of payment after twenty years of a judgment or decree governed the case of a foreclosure judgment, as it is not for the payment of any sum of money, such judgment only being authorized in case of a deficiency after a sale. (*Barnard et al.* agt. *Onderdonk*, 98 N. Y., 158.)

10. Section 382, sub. 5 — Duress — when a contract will be set aside on the ground of — action for relief on account of, barred in six years. (*See Schoener* agt. *Lissauer*, 36 Hun, 100.)

11. Section 383, sub. 5 — Statute of limitation — when an action will be treated as one to recover damages for personal injury resulting from negligence. (*See Webber* agt. *Herkimer and Mohawk Street R. R. Co.*, 35 Hun, 44.)

12. Sections 388, 394 — The provision of the Code of Civil Procedure (sec. 394), limiting to three years the time for bringing an action against a director or stockholder of a moneyed corporation "to recover a penalty or forfeiture imposed, or to enforce a liability created by law," does not apply to an equitable action against the director of such a corporation to require an accounting and to recover damages for their neglect and inattention to the duties of their trusts whereby they suffered corporate funds to be lost and wasted. Such an action is simply the enforcement of a common-law liability, while the words of the provision, "a liability created by law," have reference only to a liability created by statute. The limitation applicable to such an action is ten years (Sec. 388).

Where a national bank had become insolvent and one of its directors had been appointed receiver, an action was brought against him and the other directors for neglect of their duties, by one of the stockholders on behalf of

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himself and the other stockholders: *Held*, that as to other stockholders who became parties to the action upon their petition, the statute of limitations began to run from the time of the commencement of the action, not from the time of filing their petitions; that for the purposes of the statute of limitations the action must be treated as if all the stockholders were originally plaintiffs.

It seems that the original plaintiff could, at any time before other stockholders were made parties, and before judgment, have settled his individual claim and executed a release thereof and discontinued the action, but upon prosecution to judgment it is for the benefit of all the stockholders and he ceases to have control over it.

It seems, also, that as to stockholders who do not come in, the suit having been commenced for their benefit, the rights are not barred by any lapse of time after the commencement. (*Brinckerhoff et al. agt. Bostwick et al.*, 99 N. Y., 185.)

13. Section 300 — Before the adoption of the Code of Civil Procedure the statute of limitations of a foreign state constituted no defense to an action brought here, but this section of the Code of Civil Procedure has changed the rule to some extent.

In this case the cause of action does not come within the exceptions of this section, for the reasons: *First*. The cause of action did not originally accrue in favor of a resident of this state, but in favor of a resident of the state of Ohio. *Second*. Because before the expiration of the period of limitation the person in whose favor the cause of action originally accrued did not become a resident of the state of New York as he lived and died in Ohio; and because, *Third*. The cause of action was not assigned before the expiration of the time so limited to a resident of this state. (*Howe agt. Welch*, ante, 501.)

14. Section 421 — Appearance — it must be made either by service of a notice of appearance, or of a demurrer or answer. (*See Valentine agt. Myers' Sanitary Depot*, 36 Hun, 201.)

15. Section 432 — Defendant issued a freight receipt with the name of person served upon it as agent; receipt to be signed for agent not for company; receipt printed in blank with "Form 21, N. Y.," at head:

Held, that the Code does not specify agency, except person served must be managing agent. * * * Every object is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of service made. The statute is satisfied if he be managing agent to any extent. (*Palmer agt. The Pennsylvania Company*, ante, 156.)

16. Section 432 — Foreign corporation — service of the summons upon a managing agent within this State — who is to be deemed a "managing agent" within the meaning of this section of the Code of Civil Procedure. (*See Palmer agt. Pennsylvania Co.*, 35 Hun, 369.)

17. Sections 438, 439 — Where there was furnished to the judge who made the order for the service of a summons by publication a verified complaint showing a sufficient cause of action against the defendants to be served, and positive proof by affidavit that they resided in Ireland, and that the attorneys for the plaintiff delivered copies of the summonses to B. with directions to serve them; proof by the affidavit of one of the attorneys for plaintiff that he was informed and believes that the summons could not, after due diligence, be served on the defendants, supplemented by the affidavit of B., who was charged with the duty of making the service; that he had served

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the summons on a number of the defendants, but that he had been unable, with due diligence, to make personal service on the three defendants named, and he also proved their non-residence:

Held, that the statutory requirements of the Code of Civil Procedure have been complied with, and that the affidavits are sufficient.

The statutes do not require extreme diligence or extraordinary exertion. They only require proper and suitable diligence, such as the circumstances of the case require. (*Wunnenberg agt. Gerarty, ante*, 131.)

18. Section 428, sub. 5.—Service of summons by publication upon an absent resident in an action of foreclosure. (*See Coffin agt. Lester*, 36 *Hun*, 847.)

19. Sections 43^c, 451—Where, in an action of foreclosure, unknown owners are made defendants, as authorized by these sections of the Code of Civil Procedure and are described in the summons, the addition of the words "if any," does not invalidate the process. (*Abbott agt. Curran*, 98 *N. Y.*, 666.)

20. Section 439—Service of summons by publication—what facts show inability to make a personal service. (*See Wunnenberg agt. Gearty*, 36 *Hun*, 243.)

21. Section 448—Where the question is one of a common or general interest of many persons, or where the persons who may be made parties are very numerous, it being impracticable to bring them all before the court, then one may sue for the benefit of all. The word "many" is not used in this section of the Code of Civil Procedure to express the idea of *very numerous* persons. There are two classes named, where one may sue for all. One is, where many persons have a common interest and another where the parties are so

numerous that it is impracticable to bring them all before the court. While the word "*many*," as here used, contemplates more than one, it does not necessarily *very numerous persons*, while the word "*many*," as ordinarily used, is synonymous in meaning with "*numerous*." As used in this section, in connection with the words "common or general interest of the persons," it means a limited number. It is the character of the interest which controls rather than the number of persons. The third class mentioned "*very numerous*," one is allowed to sue for all, as a matter of convenience in the administration of justice by the court.

On a demurrer to a complaint, the test of the unity of interest intended by this section is that the joint connection with or relation to the subject-matter, which by the established practice of the common law, courts will preclude a separate action. (*Farnam agt. Barnum, ante*, 396.)

22. Section 449—An action must be brought by the real party in interest. (*See Merchants' Loan and Trust Co. agt. Clair*, 36 *Hun*, 362.)

23. Sections 451, 1932, 1934, 1935—The court may on the trial allow the pleadings to be amended by striking out the words "and son" in the title of the action and inserting in place thereof the name of the son. (*Bannerman agt. Quackenbush et al., ante*, 293.)

24. Sections 452, 499—Under the provisions of these sections of the Code of Civil Procedure although the defendants in an action by omitting to raise an objection of defect of parties by demurrer or answer, must be deemed to have waived it, yet where the granting of relief against the defendant will prejudice rights of others who are not parties to the action, and their rights cannot be saved

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- by the judgment, and the controversy cannot be completely determined without their presence, the court must direct them to be made parties before proceeding to judgment, and a failure so to do is fatal to the judgment. (*Osterhoudt et al. agt. Bd. Sup'rs et al.*, 98 N. Y., 289.)
25. Section 484 — Under this section of the Code of Civil Procedure, trespass and slander of title cannot be joined in the same complaint. (*Dodge agt. Colby*, ante, 475.)
26. Sections 525, 526 — A verification of a pleading made by the secretary of a domestic corporation in the usual form, as required by the Code, when a pleading is verified by the party, is a sufficient verification.
It is only agents or attorneys that are required, when verifying pleadings, to set forth the grounds of their belief as to all matters not stated upon their knowledge, and the reason why the verification is not made by the party. A corporation cannot take an oath, and the statute points out the way in which it must verify a pleading. Such verification is the verification of the corporation and a verification by the party. (*American Insulator Co. agt. Bankers and Merchants' Telegraph Co.*, ante, 120.)
27. Section 546 — Motion to make a complaint more definite and to state causes of action separately — within what time it must be made. (*See Brooks agt. Hanchett*, 36 Hun, 70.)
28. Section 550 — Proof that one of two partners withdrew a large amount of money from the business of the firm for the reason that it had suffered severe losses, and that the other partner had already transferred a large portion of his property to his wife without consideration, will not support an order of arrest against the partner who withdrew the money, without further proof that he had either disposed of any part of this sum or intended to do so to defraud his creditors. (*Scott and others agt. Reed*, ante, 521.)
29. Section 603 — A court having power to, and which appoints a receiver of the assets of an insolvent corporation, may, in aid of that appointment, forbid any after interference, by way of levy and seizure by attachment or execution, with the property in his possession.
The provisions of sections 603 et seq., in reference to injunctions, have no application to such a case.
The exercise of the right to restrain such interference being in the discretion of the court, its determination is not reviewable here. (*Woerishoffer agt. North River Const'n Co.*, 99 N. Y., 398.)
30. Section 635, sub. 2 — Attachment — when the action is one for a wrongful conversion of personal property. (*See Gladke agt. Maschke*, 35 Hun, 476.)
31. Section 635 — Contract — when a foreign judgment is deemed to be one — Code of Civil Procedure, sec. 635 — right of an assignee of a foreign judgment to sue thereon in this state — when a stay granted in a foreign country is operative here. (*See Nazro agt. McCalmont Oil Co.*, 36 Hun, 296.)
32. Section 636 — An affidavit for an attachment made by H. states as follows: "I am a member of the firm of D. & Co., and one of the plaintiffs above-named, the only plaintiffs so above-named being D. and himself, it is a fair presumption that they constitute the firm."
It is to be presumed that if counter-claims existed in favor of the defendant, that some knowledge of that fact would have been possessed by the plaintiff H. mak-

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ing the affidavit. For the purposes of the statute his knowledge constituted that which was known to the plaintiffs, and his allegation is a substantial compliance therewith.

An affidavit by B. which states that he was the bookkeeper of the plaintiffs and personally acquainted with the defendant; that the defendant had in his possession several statements showing a balance due to the plaintiffs for the goods sold and delivered to him, and that he had frequently acknowledged to the affiant his indebtedness to the plaintiffs for the amount claimed, is sufficient to show the existence of a cause of action in favor of the plaintiffs against the defendant. (*Doctor agt. Schnepf, ante, 52.*)

33. Section 636 — Attachment — when the affidavit may be made by an agent. (*See Gribbon agt. Back, 35 Hun, 511.*)

34. Section 636 — Attachment — affidavit by agent — it must show the source from which the information is derived. (*See Marine Nat. Bank of N. Y. agt. Ward, 35 Hun, 895.*)

35. Section 709 — The provision of section 709 of the Code of Civil Procedure permitting the sheriff to hold property taken under an attachment after the warrant of attachment has been vacated on the application of defendant, until his costs and expenses have been paid, and sell it for their payment, is unconstitutional, as being in effect to allow him to hold and dispose of the property of one party to pay the debt exclusively of another (*See Hall agt. United States Reflector Company, 68 How, 51.*) (*Bowes agt. The United States Reflector Company and others, ante, 440.*)

36. Section 709 — Vacating an attachment — when the defendant cannot be compelled to pay the

sheriff's costs and expenses—Code of Civil Procedure, sec. 709, its provisions directing the payment of sheriff's costs, &c., is unconstitutional. (*See Bowes agt. U. S. Reflector Co., 36 Hun, 407.*)

37. Sections 721, 724 — There being no want of jurisdiction, if there are any defects or irregularities in the judgment, or proceedings or execution, they can be taken advantage of only by the defendant.

The alleged irregularities and informalities may be amended or corrected by an order to be entered herein. (*Root agt. Meyer, ante, 20.*)

38. Section 723 — Execution against the person — irregularities in the recited — when amendable — stipulation not to sue for false arrest — power of the court to compel a party to make it — Code of Civil Procedure, secs. 1872, 1489. (*See Walter agt. Isaacs, 36 Hun, 233.*)

39. Sections 738, 1278, 1832 — Where defendants were sued as partners upon a partnership indebtedness, and one appeared and defended the action, the other defendant not being served with process and not appearing, the one appearing served an offer to allow judgment to be taken "against him" for sixty-five dollars and fifty-four cents, with interest and costs. The plaintiff recovered a judgment against the defendants "jointly" for seventy-two dollars and ninety-one cents, but this included interest, so that the judgment, "in amount," is not more favorable than the offer:

Held, that a joint judgment could not have been entered upon the offer; and, therefore, the recovery is more favorable, as it is enforceable against the joint property of both defendants, as well as the property of the defendants served, and the plaintiff is entitled to tax his costs. (*Bannerman agt. Quackenbush et al., ante, 82.*)

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40. Section 740 — Upon a motion by an attaching creditor to set aside a judgment and execution, which judgment had been entered upon plaintiff's acceptance of an offer made by defendants, because the acceptance did not have annexed thereto any affidavit to the effect that the plaintiff's attorneys were duly authorized to accept said offer, as required by this section of the Code of Civil Procedure:

Held, that the court has power to allow an amendment *nunc pro tunc*, annexing the proper affidavit; and where it appears that the omissions to annex the proper affidavit to the acceptance was an inadvertence of the attorney, and that the authority to accept actually existed, the amendment should be granted. (*Stark* agt. *Stark and another*, ante, 360.)

41. Section 757 — Order of substitution — an assignee may be substituted as plaintiff although a counter-claim has been pleaded. (*See Schlichter* agt. *S. Brooklyn Saw Mill Co.*, 35 *Hun*, 839.)

42. Section 779 — The costs imposed upon the first motion made in this matter by the party now moving remaining unpaid, the court is powerless to entertain the present motion, as by the non-payment of such costs all proceedings on the part of the party required to pay them are stayed. (*The National Bank of Port Jervis* agt. *Hanse*, ante, 200.)

43. Section 829 — It is not the intention of the Code (sec. 829) to prevent a party to a suit from testifying to any intrinsic fact that tends to contradict a witness who swears to transactions or communications had between such party and a deceased person, even where he cannot directly testify that no such conversation or transaction was ever had.

It was not the intention to prevent the contradiction of a living witness, but to prevent a living

party to a transaction or communication from testifying to it himself when death has closed the mouth of the other party.

So when a living witness swears to a contract made by a defendant with a deceased party at a specified time or place, there is nothing in the Code to prevent the defendant from testifying that at the time named he was in Europe or at some distant place, rendering it impossible that the witness speaks the truth. (*McKenna* agt. *Bolger*, ante, 411.)

44. Section 829 — Evidence — when inadmissible as relating to a personal transaction with a deceased person. (*See Boughton* agt. *Bogardus*, 35 *Hun*, 198.)

45. Section 829 — Evidence — meaning of the words "interested in the event" in this section of the Code of Civil Procedure. (*See Moore* agt. *Oviatt*, 35 *Hun*, 216.)

46. Section 829 — Objections to evidence must be specific. (*See Riggs* agt. *American Home Mis. Society*, 35 *Hun*, 656.)

47. Section 829 — Evidence — when inadmissible as involving a personal transaction between a party and a dead person. (*See Oliver* agt. *Freleigh*, 36 *Hun*, 633.)

48. Section 829 — The provision of this section of the Code of Civil Procedure, prohibiting a party to an action from testifying in his own behalf against an executor, &c., of a deceased person "concerning a personal transaction or communication between the witness and the deceased person," does not necessarily, and under all circumstances, exclude the evidence of a party so testifying, when it tends only to negative or affirm the existence of such a transaction or communication.

Where the party representing the deceased person has as a witness in his own behalf given ma-

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terial evidence, the adverse party, although precluded from directly proving the existence of such a transaction or communication, may testify as to extraneous facts tending to controvert such evidence, although those facts may incidentally tend to establish the inference that such a transaction or communication has or has not taken place. (*Lewis* agt. *Merrill*, 98 *N. Y.*, 206.)

49. Section 834 — The contract of insurance contained a condition that if the insured should commit suicide or die by his own hand the policy should become void. The defendant proved and the plaintiff conceded that the insured did die by his own hand. The plaintiff sought to prove that the insured was insane at the time, and that in a legal sense he did not commit suicide or die by his own hands, and called the physician who attended the deceased during all the period of his mental disturbance, on this question. Defendant objected to this evidence on the ground that he was not competent by reason of the prohibition contained in this section of the Code of Civil Procedure:

Held, that as the evidence was produced for the purpose of protecting the estate of the deceased, and to uphold a contract made by him in his lifetime with the defendant, the executors, as his personal representatives, possessed the right and privilege of releasing the physician from the statutory obligation of secrecy, and defendant had no ground for an exception.

After the plaintiff had introduced all his evidence on the question of the insanity of the deceased, and had rested his case for the second time, the defendant offered evidence to show the nature of the insanity of deceased, and that the insanity with which he was afflicted was hereditary in its character. The offer was rejected upon the ground that the

defendant's case had been rested, and that it had not been pleaded:

Held (*BARKER, J.*), that the first reason for rejecting the evidence was not well founded for the reason that prior to the time of this offer it would not have been pertinent for the defendant to give any evidence on the subject of the insanity of the insured, as no question had then been made as to such insanity. The plaintiff raised that question and gave evidence tending to prove the insanity of the insured at the time he took his own life, with a view of avoiding the legal effect of the act, and the defendant sought to meet this position of plaintiff and to show the nature and degree of the insanity, and this made the evidence offered material and competent (*SMITH, P. J., and HARDIN, J., dissenting*).

Held, further (*BARKER, J.*), that the other ground was equally without foundation, as it is set forth in the answer that it was a condition of the contract, in case the insured should commit suicide or die by his own hand, the policy of insurance should become null and void, and it is also alleged he did commit suicide and did die by his own hand. (*Westover* agt. *The Aetna Life Ins. Co.*, *ante*, 168.)

50. Section 834 — By this section of the Code of Civil Procedure, a physician is prohibited from disclosing any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, and the seal of the law placed upon such disclosures can be removed only by the express waiver of the patient himself.

Whenever the evidence comes within the purview of the statute it is absolutely prohibited and may be objected to by any one, unless it be waived by the person for whose benefit the statute was enacted.

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An executor or administrator does not represent a deceased person for the purpose of making such a waiver. He represents him simply in reference to right of property and not in reference to those rights which pertain to the person and character of the testator (*Reversing S. C., ante, 163*). (*Westover agt. The Aetna Life Ins. Co., ante, 184.*)

51. Section 837 — Actions against trustee to recover corporate debts as a penalty for failure to file annual reports are "penalties," within the meaning of section 837 of the Code of Civil Procedure. In such actions a party defendant is privileged from answering any question concerning the facts alleged in the complaint and cannot be compelled to answer upon an examination before trial any question which would support the claim of the plaintiffs, either against himself or his co-defendants. (*Hughen agt. Woodward, ante, 127.*)

52. Section 870 — Examination of a party before trial — when not refused because it might tend to show the party guilty of a criminal offense. (*See Davies agt. Fish, 35 Hun, 430.*)

53. Section 873 — Order for the examination of a corporate party before trial — a defaulting defendant may be examined. (*See N. Y., L. E. and W. R. R. Co. agt. Carhart, 36 Hun, 288.*)

54. Section 983 — Under the provisions of the act of 1875 (*secs. 1, 2, 3, chap. 405, Laws of 1875*), as amended (*chap. 359, Laws of 1876; chap. 153, Laws of 1879*), imposing a penalty upon the agent of a foreign insurance company who effects or procures an insurance against fire upon property within the limits of a city or incorporated village, without having first given a bond to the treasurer of the fire department of the municipality,

conditioned for the payment to such treasurer of a percentage on premiums received, the cause of action so given arises in the municipality; it is immaterial where the contract of insurance was actually signed.

Under the provision, therefore, of this section of the Code of Civil Procedure requiring that an action to recover a statutory penalty shall be in the county "where the cause of action, or some part thereof, arose," an action to recover such a penalty is triable in the county wherein the city or village is located. (*Ithaca Fire Department agt. Beecher et al., 99 N. Y., 429.*)

55. Section 1003 — Trial of a specific question by a jury in an equitable action — when an order granting or refusing a new trial in, is appealable — Code of Civil Procedure, sec. 1847, sub. 2 (*See Bowen agt. Becht, 35 Hun, 484.*)

56. Section 1019 — The sixty days in which a referee must make his report do not commence to run until the cause is submitted.

Where briefs are to be submitted, there is no submission of the cause until the time to hand in the briefs is passed.

The referee has power to enlarge the time for the submission of briefs.

Having his report ready and tendering it on payment of his fees, within the sixty days, is sufficient (*See to same effect decision by general term, first department, Little agt. Lynch, 1 How [N. S.], 95.*) (*Morrison agt. Lawrence, ante, 72.*)

57. Section 1166 — If a trial proceeds, and a verdict be rendered without a jury being sworn, such a verdict is not irregular and void, when neither party asked that the oath should be administered.

That which the law requires to be done for the protection of a party, may be waived, and the failure to object is a waiver.

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- Nor can failure to object be excused by alleged ignorance. (*Jenkins* agt. *City of Hudson*, ante, 244.)
58. Sections 1240, 1241, 1769, 1778, 3343 — Business partnerships between husband and wife are not authorized.
- Therefore a husband cannot claim under a business copartnership with his wife, the right to a dissolution of the same and the appointment of a receiver.
- This is adverse to *Zimmerman* agt. *Erhard and Dodge* (59 *How.*, 11); and *Graff et al.* agt. *Kinney* (1 *How.* [N. S.], 59); see, also, *Fairles* agt. *Bloomington* (67 *How.*, 292). (*Jacquin* agt. *Jacquin*, ante, 51.)
59. Section 1241, sub. 2 — Contempt of court — when the failure of a defendant to comply with the directions of a final judgment cannot be treated as a contempt — Code of Civil Procedure, secs. 1778, 1769; sec. 8, sub. 3 — "mandate," meaning of. (*See Jacquin* agt. *Jacquin*, 36 *Hun.*, 878.)
60. Section 1256 — Lien of a judgment — effect of opening the judgment and allowing it to stand as a security for what may be thereafter recovered. (*See Holmes* agt. *Bush*, 35 *Hun.*, 637.)
61. Section 1323 — Under the provision of this section of the Code of Civil Procedure authorizing an appellate court, on reversal of a final judgment, to "make or compel restitution of property or of a right lost by means of the erroneous judgment," such court cannot restore property taken and sold under another judgment, although the effect of the reversal is to decide that the property was taken from the party legally entitled to it; it may interfere in this summary manner only to restore property or rights lost by the judgment reversed. (*Murray* agt. *Berdell et al.*, 98 *N. Y.*, 480.)
62. Section 1347, sub. 2 — Trial of a specific question by a jury in an equitable action — when an order granting or refusing a new trial in, is appealable — Code of Civil Procedure, sec. 1008. (*See Bowen* agt. *Becht*, 35 *Hun.*, 434.)
63. Sections 1370, 450 — In an action wherein an attachment had been issued, upon the ground that defendant, a resident of the state, had departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, the execution directed the sheriff to collect the judgment out of the attached personal property, and if that was insufficient, out of the real estate attached: *Held*, that, so far as the real estate was concerned, the execution was void, and a sale under it conveyed no title; that the provision of the Code of Civil Procedure (sec. 1370, sub. 2) prescribing the form of execution in such case is peremptory, and the attached real estate could not be resorted to until the remedy against the debtor's personal property, both attached and unattached, had been exhausted.
- It seems* that where the attachment judgment and execution are regular, a *bona fide* purchaser on sale acquires a good title, although after a conveyance to him the defendant is allowed to come in and defend as authorized by the Code (sec. 445) and succeeds in his defense.
- Under a void process, however, no title can be acquired, and a *bona fide* purchaser, as against the owner of the property, stands in no better position than one purchasing with full knowledge of the invalidity. (*Place* agt. *Riley et al.*, 98 *N. Y.*, 1.)
64. Section 1372 — Execution against the person — irregularities in the recital — when amendable — stipulation not to sue for false arrest — power of the court to compel a party to make it — Code of Civil

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- Procedure, secs. 723, 1489. (*See Walter agt. Isaacs, 36 Hun, 233.*)
65. Sections 1390, 1391 — Exempt property. (*See Salisbury agt. Parsons, 36 Hun, 12.*)
66. Section 1393 — Deposit of pension in savings bank — exempt from execution. (*See Stockwell agt. Nat. Bank of Malone, 36 Hun, 583.*)
67. Section 1393 — What property is exempt, as pay of a soldier. (*See Burgett agt. Fancher, 35 Hun, 647.*)
68. Section 1489 — Execution against the person — irregularities in the recital — when amenable — stipulation not to sue for false arrest — power of the court to compel a party to make it — Code of Civil Procedure, secs. 723, 1372. (*See Walter agt. Isaacs, 36 Hun, 233.*)
69. Sections 1667, 1668 — Costs — when the plaintiff is entitled to them, on the ground that the title to real property is put in issue by the pleadings — Code of Civil Procedure, sec. 3228, sub. 1. (*See Crowell agt. Smith, 35 Hun, 182.*)
70. Section 1758 — Condonation of adultery by subsequent cohabitation with knowledge does not bar an after-brought action for divorce predicated on such adultery, where the condonation is upon the promise by the guilty party (the husband) that he would in all things thereafter treat his wife kindly and in a proper manner, and would be in all things a good and affectionate husband to her, when such promise has been violated. (*Timerson agt. Timerson, ante, 526.*)
71. Section 1760 — Contempt of court — when the failure of a defendant to comply with the directions of a final judgment cannot be treated as a contempt — Code of Civil Procedure, sec. 1773; sec. 1241, sub. 2; sec. 8, sub. 3 — "mandate," meaning of. (*See Jacquin agt. Jacquin, 36 Hun, 378.*)
72. Section 1773 — Contempt of court — when the failure of a defendant to comply with the directions of a final judgment cannot be treated as a contempt — Code of Civil Procedure, secs. 1773, 1759; sec. 1241, sub. 2; sec. 8, sub. 3 — "mandate," meaning of. (*See Jacquin agt. Jacquin, 36 Hun, 378.*)
73. Section 1776 — In proceedings by a railroad corporation to acquire title to lands, the petition averred the due incorporation of the petitioner. A counter affidavit denied any knowledge or information sufficient to form a belief as to the truth of said averment: *Held*, that considering this simply as an affidavit, it was not a denial of the averment; that treating it as an answer, there was no such denial as put the petitioner to proof of its incorporation, as under this section of the Code of Civil Procedure a corporation plaintiff is not required to prove its corporate existence unless the answer contains an affirmative allegation that plaintiff is not a corporation; that therefore, conceding the landowner might, without a formal denial, disprove the fact, the burden was upon it of proving the petitioner was not a corporation. (*Matter of Petition of N. Y. L. and W. R. Co., 99 N. Y., 12.*)
74. Section 1780 — When one foreign corporation can sue another in this state. (*See Duquesne Club agt. Penn Bank of Pittsburgh, 35 Hun, 390.*)
75. Section 1780 — Foreign corporation — right of a non-resident to sue it in this state. (*See Adams agt. Penn Bank of Pittsburgh, 35 Hun, 393.*)
76. Section 1835 — Where the claim, as presented, was for \$4,728.78, and

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the defendant not only rejected the entire claim of the plaintiff, but set up a counter-claim against him for the sum of \$2,624.55, for which sum she asked an affirmative judgment against the plaintiff, with interest, besides costs of the action and the referee appointed to hear and decide the issues, rejected the counter claim entirely and found \$821.55 due to the plaintiff from the estate:

Held, that the attempt made by the defendant to recover judgment for a large and independent claim against the plaintiff, in which she entirely failed, constituted an unreasonable resistance to the demand of plaintiff and entitled him to the costs of the action.

Held, further, that the attempt by the defendant to recover through the suit brought against her a large counter-claim against the plaintiff, brings her within the cases provided for by section 1835 of the Code of Civil Procedure, in which costs may be awarded to the plaintiff. (*Sutton* agt. *Newton*, ante, 56.)

77. Section 1871—Judgment creditor's action—when maintainable after the judgment has ceased to be a lien upon real estate. (*See Scoville* agt. *Shed*, 38 *Hun*, 165.)

78. Section 1871—A judgment creditor's action, whether instituted under the Revised Statutes (2 *R. S.*, 174, *secs.* 38 *et seq.*), or the Code of Civil Procedure (*secs.* 1871 *et seq.*), can reach only property belonging to, or things in action due to the judgment debtor or held in trust for him. The fact that the debtor paid the consideration for property conveyed at his instance to another, does not alone authorize a judgment directing the taking of the property to satisfy the debt. (*Niver* agt. *Crahe* *et al.*, 98 *N. Y.*, 40.)

79. Section 1871—Where a trust provides for the payment of the income of the trust fund to the

beneficiary, a judgment creditor of such beneficiary may maintain an action in equity to reach and appropriate to the payment of his judgment the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those dependent upon him.

This rule applies as well where the trust fund from which the income is derived is personal property as where it is real estate.

The disposition of the income may not be anticipated by the *cestui que trust* or incumbered by any contract entered into by him, providing for its pledge, transfer, or alienation previous to its accumulation.

The creditor, by the commencement of the action, acquires a lien upon the accrued and unexpended surplus, or that subsequently arising from the fund superior to the claims of general creditors or assignees of the *cestui que trust*. (*Tolles* agt. *Wood et al.*, 99 *N. Y.*, 616.)

80. Sections 1902, 1904—The facts that the children of a person killed through the negligence of another are of full age, are living away from the home of the deceased, and are supporting themselves, do not alone establish that they have sustained no such pecuniary damages as will authorize a recovery in an action under the statute (*chap.* 450, *Laws of 1847*; *Code of Civ. Pro.*, *secs.* 1902-4) against the wrong-doer. (*Lockwood* agt. *N. Y.*, *L. E. and W. R. R. Co.*, 98 *N. Y.*, 538.)

81. Section 1902—The cause of action given by the statute (*chap.* 450, *Laws of 1847*; *Code of Civil Pro.*, *sec.* 1902) to the representatives of a decedent, whose death was caused by the negligence of another, abates upon the death of the wrong-doer, and an action cannot be maintained against his representatives (*Yertore* agt. *Wissah,* 16 *How. Pr.*, 8, *overruled*;

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Needham agt. *G. T. R. R. Co.*, 38 *Vi.*, 294, distinguished.)

The history of the statutory modifications in this state of the rule of the common law as to the survivability of actions given, and the authorities upon the subject collated (*Hegerich* agt. *Keddie*, 32 *Hun.*, 141, reversed). (*Hegerich* agt. *Keddie*, 99 *N. Y.*, 258.)

82. Section 1942—Release of one of several joint debtors. (*See Marz* agt. *Jones*, 36 *Hun.*, 290.)

83. Sections 2239 to 2265—The court may restrain, by injunction, summary proceedings, if the justice goes beyond his jurisdiction, either in taking cognizance of the proceedings or while he is acting in it, and if it appears that the justice who granted the warrant, the enforcement of which is sought to be restrained, was without jurisdiction, the injunction should be continued.

A justice has no power in summary proceedings to adjourn the same except for the purpose of enabling a party to procure his necessary witnesses.

Where, upon the return of the precept, the tenant filed a verified traverse of the return and moved to dismiss the proceedings, and the justice, after hearing the testimony of the parties as to the service of the precept instead of rendering his decision upon the close of the evidence, adjourned the proceedings for the purpose of decision:

Held, to operate as a discontinuance of the proceedings.

A justice, other than the one before the precept is returnable, has no jurisdiction to issue the warrant. (*Kiernan* agt. *Reming*, ante, 89.)

84. Section 2285—Contempt—the refusal of a witness to answer questions may be punished either criminally or civilly—Code of Civil Procedure, sec. 8, sub. 5; sec. 14, sub. 5—length of the confine-

ment—form of the commitment. (*See People ex rel. Jones* agt. *Davidson*, 35 *Hun.*, 471.)

85. Section 2458—It is not necessary to state in the affidavit to obtain order for examination of a judgment debtor, in proceedings supplementary to execution, that the city court of New York is a court of record, that no previous application for an order to examine judgment debtor has been made in the action or that the judgment was rendered upon the judgment debtor's appearance or personal service of the summons upon him. (*Sayer* agt. *MacDonald*, ante, 119.)

86. Section 2460—In examinations in supplementary proceedings in the city court, where it appears that the judgment debtor has made a general assignment for the benefit of his creditors, the examination need not be limited to property acquired since the assignment. (*Schneider et al.* agt. *Altman*, ante, 448.)

87. Sections 2467, 2468—The title to the personal property of a judgment debtor, residing in another county than that in which the judgment-roll in the action is filed, is not vested in a receiver in supplementary proceedings until the order appointing him has been filed in the office of the clerk of the county where the judgment-roll is filed, and a copy of the order, certified by that clerk, is filed with the clerk of the county where the judgment debtor resides.

And until then the receiver is not entitled to an order requiring the judgment debtor to deliver his personal property to him. (*Staats* agt. *Wemple*, ante, 161.)

88. Section 2481, sub. 6—Surrogate—power to open decrees—intermediate accounting by a guardian or trustee—no decree can be entered by the surrogate. (*See Matter of Hawley*, 36 *Hun.*, 258.)

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89. Sections 2516, 2717, 2718—Where a claim against an estate is presented, in proper form and duly verified, to the person and at the place named in the statutory notice to creditors given by executors, and after a reasonable opportunity to examine into its validity and fairness, the executors do not offer to refer on the ground that they doubt its justice, or do not dispute it, it acquires the character of a liquidated and undisputed debt against the estate (*Tucker* agt. *Tucker*, 4 *Keyes*, 136; *S. U.*, 4 *Abb. Ct. of App. Dec.*, 428; *Hoyt* agt. *Bonnett*, 50 *N. Y.*, 538, *distinguished*).

Although where application is made by the creditor, by petition to the surrogate to direct payment of such a claim, it is in the power of the executors under the provisions of the Code of Civil Procedure (*secs.* 2717, 2718), to divest the surrogate of jurisdiction and put the claimant to his proof in another court; if they fail to do this, it is only necessary for the surrogate to be satisfied by proof, that there is personal property of the estate applicable to the payment or satisfaction of the claim, and which may be applied without injuriously affecting the rights of others (*Sec.* 2718, *sub.* 2).

An oral plea of a general denial in answer to the petition is ineffectual for any purpose.

It seems that in any case as the jurisdiction of the surrogate to direct payment of a debt is confined to undisputed claims, the petitioner is neither required to state the facts which go to make out his debt, nor if stated, will he be permitted to establish them. The presentation of the petition, and the citation issued thereon (*sec.* 2516), bring in the executor, not to plead or respond to the petition, but by a verified written answer to set forth affirmatively facts, if any exist which show "that it is doubtful whether the petitioner's claim is valid and legal," and also "denying its va-

lidity or legality absolutely or upon information and belief." The answer must meet both requirements to require a dismissal of the petition. (*Lambert* agt. *Craft*, 98 *N. Y.*, 842.)

90. Section 2561—Allowance by a surrogate for an additional day occupied on a trial—allowable on a trial before a referee—not for an adjournment. (*See Matter of Clark*, 86 *Hun*, 301.)

91. Section 2570—Costs on appeal from a surrogate's court. (*See Walsh* agt. *Van Allen*, 86 *Hun*, 629.)

92. Sections 2588, 2589—Where the probate of a will was contested on the ground of undue influence, and it appeared that the testatrix had testamentary capacity, a present knowledge of the contents of the will, and that its execution was surrounded by all the guards the statute has prescribed to prevent fraud and imposition: *Held*, that the will could only be avoided by proof of influence amounting to force or coercion; and that the burden of proving this was upon the party making the allegation; also *held*, the facts that the proponent of the will was a son of the testatrix, that he communicated to the scrivener the provisions to be inserted in the will, and was himself a beneficiary, were insufficient.

To establish undue influence, there must be evidence that the parent was imposed upon or overcome by the practices of the child, to the benefit of the latter.

The surrogate refused probate; he found all the facts in favor of the proponent, save as to undue influence; there was no evidence to establish this: *Held*, that it was proper for the general term, on appeal from the surrogate's decision, to direct judgment admitting the will to probate.

The reversal of the surrogate's

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decree in such case is upon a question of law, and so the provision of the Code of Civil Procedure (*sec.* 2588), requiring, where the reversal is upon a question of fact, that a jury trial shall be ordered, does not apply.

Also *held*, that the case required an exercise of the power conferred by the Code (*sec.* 2589), to impose costs upon the unsuccessful party. (*Matter of Will of Martin*, 98 *N. Y.*, 193.)

93. Section 2607—Sureties on an executor's bond—when an action lies against them before any order or claim against the executor has been made in the surrogate's court. (*See Haight agt. Briabin*, 36 *Hun*, 519.)

94. Section 2636—Executor or trustee—right of a surrogate to remove him for habitual drunkenness—1873, chap. 79—3 R. S., (7th ed.), 2289. (*See Matter of Cady*, 36 *Hun*, 122.)

95. Section 2643—Where there are two or more persons equally entitled, under this section of the Code, to receive letters of administration with will annexed, the surrogate will appoint that person who *ceteris paribus* has the largest interest under the will. (*In the estate of Charles Morgan, deceased*, *ante*, 194.)

96. Sections 2690, 2814—The surrogate cannot justly permit an executor or trustee to resign his trust against the wishes of the legatees or *cestuis que trustent*, unless sufficient reasons are shown to exist for allowing such resignation. (*In the estate of John Baier, deceased*, *ante*, 323.)

97. Sections 2706, 2714—*First*. It is by these sections of the Code of Civil Procedure, and not by section 222 of chapter 410 of the Laws of 1382, that the procedure is now regulated by which the public administrator can cause in-

quiry to be instituted into the alleged withholding or concealment of property belonging to an intestate's estate, whereof such public administrator is in charge by virtue of letters issued to him by the surrogate.

Second. The interposition of an answer such as is contemplated by section 2710 bars all inquiry concerning property to which the respondent by such answer properly claims title.

Third. But where the applicant alleges that the person cited has in his possession or control certain specified articles of property belonging to the decedent at the time of his death, and the respondent asserts his title to a portion of such property only, such an answer does not effectually bar all further inquiry.

Fourth. Whether an affidavit is an "answer" within the meaning of section 2710 *quære*. (*In the estate of Ellis H. Elias, deceased*, *ante*, 158.)

98. Section 2706—Examination of a person having property belonging to the estate of a deceased person—all the executors or administrators should be parties to the proceeding. (*See Matter of Stingerland*, 36 *Hun*, 575.)

99. Sections 2717, 2718—Proceedings to compel the payment of a legacy—a surrogate cannot decide disputed questions arising therein. (*See Matter of Hedding Meth. Epis. Church*, 35 *Hun*, 315.)

100. Section 2718—During the pendency of proceedings for the probate of an alleged will, the contestant, who was one of the next of kin of the decedent and was named in the disputed paper as a legatee, applied for an order directing the payment of a sum of money to be charged against her legacy or her distributive share accordingly as the disputed paper might thereafter be granted or refused probate. Such paper con-

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tained a provision declaring that any legatee or devisee who should contest its validity should forfeit thereby the bequest or devise in his favor.

The respondents having filed an answer setting forth the foregoing facts and alleging that because of them the legality and validity of the petitioner's claim was doubtful.

Held, that under this section of the Code of Civil Procedure the application must be dismissed. (*In the estate of Frederick Grote, deceased, ante, 140.*)

101. Section 2817—One who is a lawful incumbent of the office of guardian, either by appointment of the surrogate or by virtue of a testamentary provision, can successfully resist in this court an application for his removal until such facts and circumstances have been established as furnish statutory warrant for his suppression.

If, within the meaning of subdivision 2 of this section of the Code of Civil Procedure, a guardian has been guilty of "misconduct in the execution of her trust," and has thereby become "unfit" to be continued in her office, she must be removed; otherwise the surrogate is powerless to displace her. (*Mutter of King, ante, 307.*)

102. Section 2863—Justices' court—amount involved—when an action does not involve the accounts of the parties within this section of the Code of Civil Procedure. (*See Brisbane agt. Bank of Batavia, 36 Hun, 17.*)

103. Section 2891—Practice in justice's court—when the plaintiff cannot recover without proving his claim—1881. chap. 414. (*See Outman agt. Schmidt, 35 Hun, 345.*)

104. Section 3017—The filing of a justice's transcript in the county clerk's office, makes the judgment

of the justice a judgment of the county court for all purposes.

The statute of limitations applicable to such a judgment, is the statute applicable to judgments rendered in courts of record. (*Spencer agt. Waul, ante, 117.*)

105. Section 3068—When a new trial may be had in a county court on appeal from a justice's judgment. (*See Reynolds agt. Swick, 35 Hun, 278.*)

106. Section 3169—An affidavit by B., which states that "a short time ago he (defendant) represented himself to be a man of means," clearly indicates that he had arrived at mature years and that he was an adult, and is a sufficient compliance with subdivision 5 of section 3169 of the Code of Civil Procedure. (*Doctor agt. Schnepf, ante, 52.*)

107. Section 3228, sub. 1—Costs—when the plaintiff is entitled to them, on the ground that the title to real property is put in issue by the pleadings—Code of Civil Procedure, secs. 1667, 1668. (*See Crowell agt. Smith, 35 Hun, 182.*)

108. Section 3228, sub. 3—Costs—when an action is on contract, and when in tort. (*See Feeney agt. Brooklyn City R. R. Co., 36 Hun, 197.*)

109. Section 3334—Under this section of the Code of Civil Procedure the same rule prevails in ejectment as in replevin.

Where in an action of ejectment the complaint contained but one count to recover two separate parcels of land, separately described in the count, and as to both parcels the plaintiff's right to recover was put in issue by the answer, the verdict of the jury being in favor of the plaintiff as to one parcel, and in favor of the defendant as to the other, the defendant is entitled to costs as well as the

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- plaintiff. (*Coon* agt. *Dieffendorf*, ante, 389.)
110. Section 3234—Costs—when the defendant is not entitled to costs, although he succeeds upon some of the issues—costs cannot be taxed for an attachment which has been set aside. (*See Barlow* agt. *Barlow*, 35 *Hun*, 50.)
111. Section 3234—Costs—when each party is entitled thereto. (*See Ackerman* agt. *De Lude*, 80 *Hun*, 44.)
112. Section 3240—Costs on appeal from a surrogate's court—Code of Civil Procedure, sec. 2370. (*See Walsh* agt. *Van Allen*, 86 *Hun*, 629.)
113. Section 3247—Under the second subdivision of this section, it being the same as section 321 of the Code of Procedure, a person becoming in any manner possessed of a cause of action after suit brought thereon is liable for all the costs of the action "the same as if he were a party," as well those accruing before as after he became so possessed. (*Olmead* agt. *Keyes*, ante, 1.)
114. Sections 3251, 420, 788—In an action upon contract, where the amount due is capable of computation, and may be easily ascertained in that way, and the defendant serves an offer of judgment for a specific sum, with interest and costs; and after the offer is made both parties serve notice of trial, after which time the plaintiff accepts the offer, he is only entitled to costs before notice of trial—fifteen dollars. No application to the court was necessary, and but fifteen dollars are recoverable.
- Where the action is against a receiver, and the plaintiff has to obtain leave to sue the receiver, he is not entitled to costs as upon application to the court. (*Douglas* agt. *Macdurmisd*, ante, 289.)
115. Section 3252—In an action by a vendor to foreclose a land contract, in which the plaintiff recovers, he is not entitled to the additional allowance provided by section 3252 of the Code of Civil Procedure. (*Burkhart* agt. *Babcock*, ante, 512.)
116. Section 3253—Where, in an action brought by taxpayers to have a contract made by a municipal corporation, by which it agreed to pay a sum specified for the performance of certain work, declared invalid, the plaintiff was defeated and judgment was rendered in favor of the contractor with the corporation, adjudging the contract to be valid, and that it had been performed by the contractor: *Held*, that "the value of the subject-matter involved" was for the purposes of computing an extra allowance, the contract price for the work, not simply the profits made thereon. (*Mingay et al.* agt. *Holly Mfg. Co.*, 99 *N. Y.*, 270.)
117. Sections 3268, 3160—In an action in the city court of New York, a plaintiff residing without the state, but having an office in the city of New York, where he regularly transacts business in person, cannot be required to give security for costs.
- Sections 3268 and 3160 Code of Civil Procedure construed. (*Wyckoff* agt. *Deolin*, ante, 333.)
118. Section 3271—A person who brings an action in the name of the overseer of the poor under chapter 628 of the Laws of 1857, as amended by chapter 820 of the Laws of 1873, to recover penalties for a violation of the excise law cannot be required to file security for costs under this section of the Code of Civil Procedure.
- This section does not apply (*Sharp* agt. *Fancher*, 29 *Hun*, 133, criticised and not followed; *Board of Commissioners of Excise* agt. *McGrath*, 27 *Hun*, 425, followed). (*Matter of Martin*, ante, 26.)

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119. Sections 8333, 3334, 3240 — A proceeding under the general railroad act (*sec. 28, chap. 140, Laws of 1850*) by one railroad corporation to secure a crossing over the track of another railroad is a special proceeding (*Code of Civ. Pro., secs. 3333, 3334*), and the costs therein are, as a general rule, in the discretion of the court (*Sec. 3240; RAPALLO and MILLER, JJ., dissenting*). (*Matter of Cortland, &c., Horse R. R. Co., 98 N. Y., 836.*)

120. Section 3343 — Under subdivision 18 of this section of the Code of Civil Procedure, the location of a federal corporation is determined by the place of its principal office. Its domicile is where its principal office is. (*Rosenbaum agt. Union Pacific Railway Co., ante 45.*)

121. Sections 8355, 90, 2511 — That in view of section 8355 of the Code, sections 90 and 2511 must be construed as if they had simultaneously become law, and that so construed, "a clerk or other person employed in the surrogate's office" is competent to act as referee, in a proceeding pending in the surrogate's court, provided he is appointed with the written consent of all the parties appearing.

That the stenographer of the surrogate's court is not within the scope of section 90 or of section 2511. (*In the estate of Tunis Cooper, deceased, ante 38.*)

CODE OF CRIMINAL PROCEDURE.

1. Section 8, sub. 3 — Right of one accused of crime to be confronted with witnesses — meaning of the requirement — U. S. Const., art. 6; and art. 14, sec. 1 — bill of rights, sec. 14. (*See People agt. Williams, 35 Hun, 516.*)

2. Sections 273, 275 — Pleadings in

criminal cases — how affected by the Code of Criminal Procedure, sections 273, 275, 323 — form of indictment — motion in arrest of judgment — when a verdict will not be set aside because of the misconduct of the jurors. (*See People agt. Menken, 36 Hun, 90.*)

3. Section 323 — Upon what grounds a motion in arrest of judgment cannot be made. (*See People agt. Menken, 36 Hun, 90.*)

4. Section 369 — Peremptory challenge — when the right must be exercised — the time for the exercise of the right cannot be limited by the court. (*See People agt. Carpenter, 36 Hun, 315.*)

5. Section 376 — Jurors in a criminal action — when not disqualified by reason of having formed an opinion. (*See People agt. Willett, 36 Hun, 500.*)

6. Sections 411, 415 — Misconduct of juror — when the court cannot punish it as a criminal contempt — Penal Code, sec. 73 — Code of Civil Procedure, sec. 8, sub. 3 — meaning of word "mandate." (*See People ex rel. Munsell agt. Oyer and Terminer, 36 Hun, 277.*)

7. Section 455, sub. 2 — Right to review on appeal challenges to jurors — 1873, chap. 427. (*See People agt. Willett, 36 Hun, 500.*)

CODE OF PROCEDURE.

1. Section 317 — The repealing act of 1877 leaves this section of the Code of Procedure still in force, and consequently, as provided thereby in a reference under the Revised Statutes of a claim against a dead person's estate, the prevailing party is entitled to recover the disbursements provided for by that section. (*Sutton agt. Newton, ante, 57.*)

2. Section 317 — When upon a ref.

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erence of a claim under the Revised Statutes against a deceased person's estate, a report has been made in favor of the claim, costs are not recoverable unless the payment of such claim has been unreasonably neglected or resisted.

A large reduction of the *balance* claimed by the bill as presented justifies the resistance.

Neither is it unreasonable for the executrix, who is a sister of the claimant, when such claim is for board furnished to the decedent and his wife, the defendant, during a period of several years, and the value thereof is one of the questions in dispute, to insist that the amount to be paid shall be established by a reference.

Nor is it unreasonable for the residuary legatee under the will of the decedent, who is a stranger to the whole transaction, to inquire by means of a reference into the justice and legality of the claim.

Upon such a reference, however, "the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law."

The clause in this section of "The Code of Procedure," which gave them, was not repealed by the adoption of part 2 of "The Code of Civil Procedure;" nor by chapter 245 of the Laws of 1880, which professed to repeal "The Code of Procedure" left unrepealed by chapter 319 of the Laws 1877, with the exceptions therein stated. The repealing act of 1880 retained and preserved "the right of a prevailing party to recover" such disbursements, using the exact language of this section.

Upon a full consideration of the question, the decisions in *Sutton* agt. *Newton* (2 How. [N. S.], 56) and in *Hall* agt. *Edmunds* (67 How., 202) adhered to; and *Miller* agt. *Miller* (32 Hun., 481) held untenable. (*Oertheiser* agt. *Morehouse*, ante, 257.)

8. Section 321 — Under this section

of the Code of Procedure, one taking an assignment or becoming in any manner possessed of a cause of action after suit brought thereon is liable for all the costs of the action "the same as if he were a party," as well those accruing before as after the assignment.

Section 3247 of the Code of Civil Procedure took effect September 1, 1880, and at that date this section of the old Code was repealed, but section 3352 of the Code of Civil Procedure protects all rights lawfully accrued or established previous to the repeal of this section. (*Olmstead* agt. *Keyes*, ante, 1.)

COLORED SCHOOLS.

See NEW YORK (CITY OF).

The People ex rel. Ray agt. *Davenport*, ante, 17.

COMMISSIONS.

1. Full commissions should be allowed executors or trustees on receiving and paying out the income, notwithstanding the trustee has received full commissions on a former accounting for receiving and investing the principal. (*Matter of Goodrich*, ante, 291.)

COMMISSIONERS.

See RAILROADS.

Matter of the New York, Lackawanna and Western Railway Co., ante, 225.

COMPLAINT.

1. The complaint in an action to recover real estate ought to aver that the plaintiff is the owner or seized in fee, and is entitled to the possession or that defendant wrongfully or unlawfully withholds possession

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from plaintiff. (*Alcord* agt. *Hetsel*, ante, 88.)

2. Alleged fraud cannot alter or change the statute. Fraud may relieve a person from an agreement, but it cannot extend the statute for bringing an action or making an election. If an actionable fraud has been perpetrated, damages by way of compensation may be awarded, but the court cannot relieve from a statute bar. (*Aken* agt. *Kellogg* and others, ante, 186.)

3. Where the complaint alleged fraud, there should also be an averment that the statement made to the plaintiff was for the interest or purpose of influencing her action, as the fraud is not a statement of a fact, but the expression of an opinion. (*Id.*)

4. The courts of this state have no jurisdiction for trespass to lands without the state. (*Dodge* agt. *Colby*, ante, 475.)

5. To maintain slander of title, it must be alleged to have been malicious. (*Id.*)

6. It is no slander to allege ownership and that plaintiff has no title. (*Id.*)

7. Under section 484 of the Code of Civil Procedure, trespass and slander of title cannot be joined in the same complaint. (*Id.*)

CONDITIONAL SALES.

1. Every contract in the nature of a conditional sale agreement must be filed according to the laws of 1884, chapter 315, or it is void as to subsequent purchasers and mortgagees in good faith. (*Campbell Printing Press Company* agt. *Ottroge*, ante, 319.)

2. The object of the statute is to render secret liens upon personal

property ineffectual as to innocent purchasers, and the courts will not permit the statute to be evaded. (*Id.*)

3. In determining whether the contract comes within the statute, the whole instrument is to be taken together and the ruling intention of the parties, to be gathered from the whole of it, is what is to be regarded. (*Id.*)

CONTEMPT.

1. The court has no power to punish a husband as for a contempt for non-payment of costs and counsel fee, which he was directed to pay by the final judgment in an action for separation. Such costs and counsel fee should be collected by execution. (*Jacquin* agt. *Jacquin*, ante, 206.)

2. Upon the trial of one Short for a criminal assault, the jury rendered a verdict of acquittal, which verdict was inconsistent with the evidence as recapitulated in the charge of the judge presiding at the trial. During the trial one of the jurors, without the permission or suggestion of the court, went, during a recess, to the premises where the assault was alleged to have been committed, for the purpose of examining them and so acquiring information not furnished by the evidence submitted to the jury. The judge had not, upon the adjournment of the court, admonished the jury, as required by section 415 of the Code of Criminal Procedure, that it was their duty not to converse among themselves on any subject connected with the trial, or to form or express any opinion thereon, until the case was finally submitted to them: *Held*, that although the juror was guilty of a misdemeanor under section 73 of the Penal Code, yet he was not guilty of a criminal contempt for which he could be summarily

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punished by the court. (*People ex rel. Munsell* agt. *Oyer and Terminer*, 86 Hun, 277.)

3. That the word "mandate," as used in subdivision 3 of section 8 of the Code of Civil Procedure, authorizing the court to punish for a criminal contempt a person guilty of a willful disobedience to "its lawful mandate," means only a written direction or order. (*Per DANIELS, J.*)

4. That it includes a verbal direction or order. (*Id.*)

CORNELL UNIVERSITY.

1. The person to be selected for a free scholarship in the Cornell University must be a student from one of the academies or public schools of the county from which he or she is to be selected. (*The People ex rel. Wright* agt. *Genung*, ante, 324.)
2. The State Normal School, located at Cortland, is not one of the public schools of Tompkins county within the intent and meaning of the statute, and an attendance at such school does not entitle a person to such scholarship. (*Id.*)
3. The candidates for such free scholarship should, each year, be selected from scholars in the academies and public schools during that year, and not from the best scholars who have at any time attended the public schools and academies of the county. (*Id.*)
4. The position that a person is not a scholar of a high school because she was graduated at the close of its last term, and hence ineligible as a candidate, cannot be sustained. For the purposes of the act she must be regarded as a scholar of that school, at least until the end of the school year, and until that school shall again commence its sessions. The in-

tention of the statute is that she may have all the advantages of that school so long as she is a member of it, and upon her final examination and graduation may then become a candidate for such scholarship. (*Id.*)

CORPORATIONS.

1. Under section 3343, subdivision 18 of the Code of Civil Procedure, the location of a federal corporation is determined by the place of its principal office. Its domicile is where its principal office is. (*Rosenbaum* agt. *Union Pacific Railway Company*, ante, 45.)
2. Where an act provides that corporations consolidated under it shall assume as a condition of the right the payment of the liabilities of the several corporations which are absorbed in the new corporation, each holder of coupons in either of the corporations so absorbed is at liberty to maintain an action directly upon contract against the new corporation, by reason of its having absorbed the one which issued the bonds. (*Id.*)
3. Actions against trustees to recover corporate debts as a penalty for failure to file annual reports are "penalties," within the meaning of section 837 of the Code of Civil Procedure. In such actions a party defendant is privileged from answering any question concerning the facts alleged in the complaint and cannot be compelled to answer upon an examination before trial any question which would support the claim of the plaintiffs, either against himself or his co-defendants. (*Hughes* agt. *Woodward*, ante, 127.)
4. Corporations attacked by the state for insolvency can, even after a receiver is appointed, use their corporate funds for their own protection in the litigation if their action is taken in good faith and

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with a reasonable hope of success in the controversy. (*Matter of the Attorney General agt. Atlantic Mutual Life Ins. Co.*, ante, 146.)

5. Defendant issued a freight receipt with the name of person served upon it as agent; receipt to be signed for agent not for company; receipt printed in blank with "Form 21, N. Y.," at head:

Held, that the Code does not specify agency, except person served must be managing agent. * * *

Every object is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of service made. The statute is satisfied if he be managing agent to any extent. (*Palmer agt. The Pennsylvania Company*, ante, 156.)

6. A trustee of a corporation, whose attendance is necessary to make a quorum, cannot act upon a claim in his own favor to bind the corporation, and by his presence he thus acts. (*United States Ice and Refrigerator Co. agt. Reed et al.*, ante, 253.)
7. Such a transaction could be at once assailed in a court of equity, and would be set aside in a suit brought by the corporation, or in the event of its unwillingness to proceed at the instance of the stockholders interested at the time. (*Id.*)
8. But such conduct and action on the part of the trustees of a corporation may, with knowledge thereof, be acquiesced in and accepted by the corporation and the stockholders, in which event they could not afterwards assail it, especially when such acquiescence has continued for several years, and the stock donated has been actually received by the donee, and has formed the subject of new engagements and liability on his part with others. (*Id.*)

9. When stockholders neglect to promptly and actively condemn the unauthorized act of the trustees, and to seek judicial relief, they will be deemed to have acquiesced in it, and an unconscionable agreement will not be disturbed when there has been a ratification of it after time has been had for consideration. (*Id.*)

COSTS.

1. Under section 321 of the Code of Procedure, one taking an assignment or becoming in any manner possessed of a cause of action after suit brought thereon is liable for all the costs of the action "the same as if he were a party," as well those accruing before as after the assignment. (*Olmstead agt. Keyes*, ante, 1.)
2. Section 3247 of the Code of Civil Procedure took effect September 1, 1880, and at that date section 321 of the old Code was repealed, but section 3352 of the Code of Civil Procedure protects all rights lawfully accrued or established previous to the repeal of section 321. (*Id.*)
3. Where the right to the costs claimed had become fixed and established by judgment, and the interest of the person, in the cause of action had been acquired prior to the repeal of section 321, his liability for the costs still continues. (*Id.*)
4. Under the second subdivision of section 3247, it being the same as section 321 of the Code of Procedure, a person becoming in any manner possessed of a cause of action after suit brought thereon is liable for all the costs of the action "the same as if he were a party," as well those accruing before as after he became so possessed. (*Id.*)
5. The repealing act of 1877 leaves

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section 817 of the Code of Procedure still in force, and consequently, as provided thereby in a reference under the Revised Statutes of a claim against a dead person's estate, the prevailing party is entitled to recover the disbursements provided for by that section. (*Sutton agt. Newton, ante, 56.*)

6. Where, by agreement of the parties, an action is brought "in lieu of a reference," that is to say, is substituted therefor, and the plaintiff is the prevailing party, he is entitled to recover the fees of the referee and witnesses and other necessary disbursements to be taxed according to law. (*Id.*)

7. Where the claim, as presented, was for \$4,728.78, and the defendant, not only rejected the entire claim of the plaintiff, but set up a counter-claim against him for the sum of \$2,624.55, for which sum she asked an affirmative judgment against the plaintiff, with interest, besides costs of the action and the referee appointed to hear and decide the issues, rejected the counter-claim entirely and found \$621.55 due to the plaintiff from the estate:

Held, that the attempt made by the defendant to recover judgment for a large and independent claim against the plaintiff, in which she entirely failed, constituted an unreasonable resistance to the demand of plaintiff and entitled him to the costs of the action.

Held, further, that the attempt by the defendant to recover through the suit brought against her a large counter-claim against the plaintiff, brings her within the cases provided for by section 1835 of the Code of Civil Procedure, in which costs may be awarded to the plaintiff. (*Id.*)

8. Where defendants were sued as partners upon a partnership indebtedness, and one appeared and defended the action, the other defendant not being served with

process and not appearing, the one appearing served an offer to allow judgment to be taken "*against him*" for sixty-five dollars and fifty-four cents, with interest and costs. The plaintiff recovered a judgment against the defendants "*jointly*" for seventy-two dollars and ninety-one cents, but this included interest, so that the judgment, "in amount," is not more favorable than the offer:

Held, that a joint judgment could not have been entered upon the offer; and, therefore, the recovery is more favorable, as it is enforceable against the joint property of both defendants, as well as the property of the defendants served and the plaintiff is entitled to tax and costs. (*Bannerman agt. Quackenbush et al., ante, 82.*)

9. A judgment entered on an interlocutory order awarding costs is not a valid judgment. Such costs are practically motion costs, and must be collected as such. (*In re Mary Brasier, ante, 154.*)
10. When upon a reference of a claim under the Revised Statutes against a deceased person's estate a report has been made in favor of the claim, costs are not recoverable unless the payment of such claim has been unreasonably neglected or resisted. (*Overheiser agt. Morehouse, ante, 257.*)
11. A large reduction of the *balance* claimed by the bill as presented justifies the resistance. (*Id.*)
12. Neither is it unreasonable for the executrix, who is a sister of the claimant when such claim is for board furnished to the decedent and his wife, the defendant, during a period of several years, and the value thereof is one of the questions in dispute, to insist that the amount to be paid shall be established by a reference. (*Id.*)
13. Nor is it unreasonable for the residuary legatee under the will of

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- the decedent, who is a stranger to the whole transaction, to inquire by means of a reference into the justice and legality of the claim. (*Id.*)
14. Upon such a reference, however, "the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law." (*Id.*)
15. The clause in section 317 of "The Code of Procedure," which gave them, was not repealed by the adoption of part 2 of "The Code of Civil Procedure;" nor by chapter 245 of the Laws of 1880, which professed to repeal "The Code of Procedure" left unrepealed by chapter 318 of the Laws 1877, with the exceptions therein stated. The repealing act of 1880 retained and preserved "the right of a prevailing party to recover" such disbursements, using the exact language of said section 317. (*Id.*)
16. Upon a full consideration of the question, the decisions in *Sutton* agt. *Newton* (2 *How.* [N. S.], 56) and in *Hall* agt. *Edmunds* (67 *How.*, 202) adhered to; and *Miller* agt. *Miller* (32 *Hun.*, 481) held untenable. (*Id.*)
17. When the question to be determined relates to the *status* of a statute which is involved in a maze of legislation, the same weight cannot be given to a decision of the general term as there would be to one involving a pure legal principle. In such a case, it is the duty of the special term when it sees plainly that statutory provisions have been overlooked to follow its own clear convictions, stating its reasons therefor respectfully, thus leaving to the general term a review of the subject. (*Id.*)
18. In an action upon contract, where the amount due is capable of computation, and may be easily ascertained in that way, and the defendant serves an offer of judgment for a specific sum, with interest and costs; and after the offer is made both parties serve notice of trial, after which time the plaintiff accepts the offer, he is only entitled to costs before notice of trial—fifteen dollars. No application to the court was necessary, and but fifteen dollars are recoverable. (*Douglass* agt. *Macdurmida*, *ante*, 289.)
19. Where the action is against a receiver, and the plaintiff has to obtain leave to sue the receiver, he is not entitled to costs as upon application to the court. (*Id.*)
20. Under section 3234 of the Code of Civil Procedure the same rule prevails in ejectment as in replevin. (*Coon* agt. *Diefendorf*, *ante*, 389.)
21. Where in an action of ejectment the complaint contained but one count to recover two separate parcels of land, separately described in the count, and as to both parcels the plaintiff's right to recover was put in issue by the answer, the verdict of the jury being in favor of the plaintiff as to one parcel, and in favor of the defendant as to the other, the defendant is entitled to costs as well as the plaintiff. (*Id.*)
22. The complaint alleged that the defendant, without leave, wrongfully entered upon the farm and premises of which the plaintiff then was, and still is, the owner and possessor, and then and there, without leave, wrongfully cut and broke down, carried away and destroyed, a large number of trees there standing and growing, to the plaintiff's damage of \$100, wherefore he demanded judgment for treble damages. The answer denied each and every allegation of the complaint. The jury found a verdict in favor of the plaintiff for twelve dollars and fifty cents

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- actual damages, and that he was entitled to recover treble damages. No certificate showing that the title to real property came in question upon the trial was given: *Held*, that as the claim to recover treble damages could, under sections 1667 and 1668 of the Code of Civil Procedure, only be made by the owner of the land, and as the plaintiff's right to recover such damages was denied by the answer, an issue was raised by the pleadings as to the title to the land and that the plaintiff was entitled to costs. (*Crowell* agt. *Smith*, 35 *Hun*, 183.)
23. Where a complaint, in an action of trespass, alleges an injury to the inheritance, a denial of the allegation of the complaint by the defendant in his answer raises a question as to the title to real property, even though the plaintiff has alleged in his complaint possession of, as well as title to, the land. (*Id.*)
24. The complaint set forth two causes of action: the first upon a promise made by the defendant to pay an agreed price for work and labor performed and rendered by the plaintiff prior to March, 1868; the second upon an implied promise to pay for work and labor performed and rendered by her after that time and prior to 1880. Upon the trial before a referee she recovered upon the first, but not upon the second cause of action. The court directed that the defendant's costs be taxed and set off against the plaintiff's judgment: *Held*, that this was error. (*Barlow* agt. *Barlow*, 35 *Hun*, 50.)
25. That the defendant was not entitled to recover costs as the substantial cause of action was the same upon each issue, within the meaning of these terms as used in section 3234 of the Code of Civil Procedure, and because the defendant had not "recovered" upon any issue within the meaning of the said section. (*Id.*)
26. Where the plaintiff is entitled to recover the costs of the action, he cannot include therein items for issuing and serving a writ of attachment which was subsequently set aside as having been improperly granted. (*Id.*)
27. Where an order granting to the defendants an extra allowance, under section 3253 of the Code of Civil Procedure, is made by the justice before whom the action was tried, and the order recites that it was made "on the pleadings, evidence, findings and decision of the court, statements and affidavits of counsel and other papers," the court at general term will not reverse the order, in the absence of an abuse of the discretionary powers vested in the court below, even though the papers presented on the appeal do not show that the case was a difficult or extraordinary one, as the facts necessary to show that it was of such a character may have been orally presented to the court below. (*Gooding* agt. *Brown*, 35 *N. Y.*, 153.)
28. In determining whether or not an additional allowance should be granted under the said section, the amount involved in the action may be considered; as the fact that a large amount depends upon its decision increases the anxiety and responsibility of the attorney and justifies the employment of eminent counsel. (*Id.*)
29. After the commencement of this action, brought by the plaintiff to procure a separation from the defendant, her husband, on account of his cruel and inhuman treatment of her, an agreement was made by which she was to return to and live with him as her husband, and he was to pay the costs and expenses of her attorney. After the plaintiff had returned to

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her husband the husband served a verified answer in the action and refused to pay to the plaintiff's attorney his costs and expenses: *Held*, that the court had power, upon the application of the plaintiff, to compel him to pay the costs and expenses of the action as fixed by the court. (*Smith* agt. *Smith*, 35 Hun, 378.)

80. The plaintiff's testatrix, an unmarried woman, of the name of Emma Sandland, deposited with the defendant, a savings bank, a sum of money in the name of Emily Sands. Before bringing this action to recover the amount of the deposit the plaintiff exhibited to the bank the pass-book containing the account, proof of his appointment as executor, and an affidavit showing the identity of his testatrix with the depositor, and that the bank book was found among her effects: *Held*, that the referee in directing a judgment in favor of the plaintiff, properly charged the defendant with the costs of the action. (*Davenport* agt. *Bank for Savings*, 36 Hun, 803.)

81. Section 259 of chapter 409 of 1882, placing the costs in certain actions against savings banks, in the discretion of the court, only applies to the particular cases distinctly specified in the section, viz., to actions by a husband to recover moneys deposited by his wife in her own name, and to actions to recover money deposited when there are claimants to the fund, other than the plaintiffs, who are not parties to the action. (*Id.*)

82. In this action of replevin, brought to recover certain articles of clothing of the value of \$852.38, alleged to have been wrongfully taken and detained by the defendant, the complaint set forth but one cause of action. Upon the trial the plaintiff recovered a judgment for \$180.20,

as the assessed value of so much of the clothing as was sold after a certain date, and the defendant, the plaintiffs having obtained possession of the clothing in this action, recovered a verdict for \$250.20, as the assessed value of so much thereof as had been sold prior to that date, with twenty-five dollars damages: *Held*, that although the complaint set forth but a single cause of action, yet, as it appeared that the sales were made at different times, and that each sale did in fact constitute a separate cause of action, each party was, under section 3234 of the Code of Civil Procedure, entitled to costs, and that the clerk erred in refusing to allow costs to the defendant. (*Ackerman* agt. *De Lude*, 36 Hun, 44.)

83. The plaintiff, while a passenger upon one of the defendant's cars, was wrongfully assaulted by the conductor and ejected from the cars. In this action brought to recover damages therefor, the jury rendered a verdict in his favor for six cents: *Held*, that the action was for an assault, and that the plaintiff was entitled, under subdivision 3 of section 3228 of the Code of Civil Procedure, to costs not exceeding the amount of his recovery, and that he could not be charged with the payment of the defendant's costs. (*Heeney* agt. *Brooklyn City R. R. Co.*, 36 Hun, 197.)

84. Where an action in the supreme court has been tried in the first judicial district, an application for an extra allowance of costs must be made in that district, although the justice before whom the action was tried resides in another district. (*Bear* agt. *American Rapid Telegraph Co.*, 36 Hun, 400.)

85. Allowance by a surrogate for an additional day occupied on a trial — allowable on a trial before a referee — not for an adjourn-

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ment—Code of Civil Procedure, sec. 2561 (*See Matter of Clark*, 36 Hun, 301.)

86. Of an action brought by the guardian and the infant *cestui que trust* for the construction of a will—direction for the payment of costs therein. (*See Wead* agt. *Cantwell*, 36 Hun, 528.)

87. When a party does not waive his right to appeal from an order, by accepting costs thereby awarded to him. (*See Matter of Water Commissioners of Amsterdam*, 36 Hun, 534.)

88. A proceeding under the General Railroad Act (sec. 28, chap. 140, *Laws of 1850*) by one railroad corporation to secure a crossing over the track of another railroad is a special proceeding (*Code of Civ. Pro.*, secs. 3333, 3334), and the costs therein are, as a general rule, in the discretion of the court (*Sec. 3240*; *RAPALLO and MILLER, JJ., dissenting*). (*In re C. and H. H. R. R. Co.*, 98 N. Y., 336.)

89. Where there is no question as to damages, and the corporation owning the road sought to be crossed opposes the application with a view to prevent the crossing, it is within the proper exercise of this discretion for the court to impose the costs upon the contesting company (*RAPALLO and MILLER, JJ., dissenting*). (*Id.*)

40. Where, in an action brought by taxpayers to have a contract made by a municipal corporation, by which it agreed to pay a sum specified for the performance of certain work, declared invalid, the plaintiff was defeated and judgment was rendered in favor of the contractor with the corporation, adjudging the contract to be valid, and that it had been performed by the contractor: *Held*, that "the value of the subject-matter involved" (*Code of Civil Pro.*, sec. 3253) was, for the purposes of

computing an extra allowance, the contract price for the work, not simply the profits made thereon. (*Mingay* agt. *Holly Mfg. Co.*, 90 N. Y., 270.)

COUNTER-CLAIM.

1. As a distinction exists between a defense and a counter-claim, when the defense is intended as a counter-claim it should be explicitly stated in the answer, so as to advise the opposite party, and in the absence of such an allegation, especially when the party defines and characterizes his answer as a defense, and it is uncertain whether a counter-claim is intended, such party is not in a position to insist that he has actually set up a counter-claim, and the answer should be construed and considered a defense. (*Ward* agt. *Comegys et al.*, *ante*, 429.)

2. A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff if the plaintiff had not sued the defendant. (*Id.*)

COURTS.

1. Courts must determine what is a legal and proper expense and charge to be paid by a county treasurer in regard to the holding of such courts. (*People ex rel. Cole* agt. *Board of Supervisors of Greene Co.*, *ante*, 483.)

2. There are contingent expenses necessarily incurred in the holding of courts for which no express statute provides, and the board of supervisors of a county must provide a fund, to be placed in the hands of its county treasurer, "to pay such contingent expenses as may become payable from time to time," and a court held in such county must determine what is a proper and lawful charge upon such fund. (*Id.*)

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3. Where the relator, in pursuance of an order made by the court, published in his newspaper the terms of the various courts appointed to be held in Greene county, and the clerk, in pursuance of said order, issued a certificate for the amount of the bill for performing the service ordered, payable out of the fund provided for the contingent expenses of the court:

Held, that the order for its payment should be obeyed by the county treasurer, and is enforceable against him by *mandamus*. (*Id.*)

4. It is not the prerogative of a board of supervisors nor of a county treasurer to adjudge an order of the court void and incapable of enforcement. (*Id.*)

5. Where a bill for publishing the terms of the court (such publication having been done under an order of the court) was presented to the board of supervisors of the county of Greene for audit, and on the rejection of such bill upon the ground that the same was not a legal charge against the county, the relator asked that a *mandamus* to compel its audit might issue:

Held, that although the order made by this court should have been obeyed by the county treasurer, and obedience thereto is enforceable against him, a *mandamus* against the board of supervisors will not be granted. (*Id.*)

6. The provisions of the Code of Civil Procedure relating to proceedings supplementary to execution are not applicable to a case in which the judgment, upon which the execution was issued, was recovered in the municipal court of the city of Rochester, and the damages included therein are less than twenty-five dollars. (*Mason* agt. *Hackett*, 35 *Hun*, 238.)

7. The supreme court has not power to order the publication, in

a newspaper, of the appointment of the terms to be held by that court, or to direct payment of the expense of such publication. (*People ex rel. Cole* agt. *Hill*, 86 *Hun*, 619.) (*Reversing S. U.*, ante, 483.)

CREDITOR'S ACTION.

1. In a judgment creditor's action to set aside as fraudulent a voluntary assignment made by the judgment debtors, it appeared that the execution was returned by the deputy sheriff unsatisfied on the day on which the action was brought, though the process was not filed by the sheriff until the following day; that plaintiffs' after having discovered that shortly before the making of the assignment, and in contemplation thereof, the assignors, who were copartners in trade, had withdrawn to their own use a considerable part of the moneys of the firm, signed with other creditors an agreement of compromise, reserving the right to withdraw by a certain day; that two weeks afterwards plaintiffs obtained an attachment against defendants for fraudulent withdrawal by the latter of moneys from their assets; that plaintiffs afterwards sought to remove the assignee, and then proved their claim and delivered their proof to the assignee, annexing a statement that they did not waive their rights under the attachment or recognize the validity of the assignment, unless it should be held to be binding upon them:

Held, first, that the return of execution was sufficient within the provisions of the Code and the rule in equity with respect to the bringing of judgment creditors' actions.

Second. That plaintiffs had not by their acts acquiesced in or adopted the assignment so as to be precluded from suing to impeach it.

Third. That the assignment was void; the assignors, while professing to surrender all their prop-

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erty through it, having intentionally withheld a considerable part of their estate from its operation. (*Tolin et al. agt. Henlein et al., ante, 311.*)

DEED.

1. A livery stable would not be offensive to a neighborhood within the meaning of a covenant not to erect any building for or to carry on upon certain premises certain enumerated trades, cow stables or hog pens, "or any other dangerous, noxious, unwholesome or offensive establishment, trade or calling, or business whatsoever." The word "cow" before "stables" limited the establishments prohibited of the same class, and the words "other," &c., do not include stables where domestic animals are to be kept. (*Flanagan agt. Hollingsworth, ante, 391.*)
2. He who conveys the absolute fee of real estate to another cannot retain the right to the purchase-price when subsequently sold. There is a distinction between the occupancy of one's property which must be temporary, unless the title of the owner is acquired, and one which is known to be permanent because the right to maintain it exists; and he who parts absolutely with the title to land to another cannot reserve to himself the right to its purchase-money where subsequently sold, because such a reservation would be inconsistent with the grant. (*Dennison agt. Taylor, ante, 528.*)
3. The defendant, who was the owner in fee of a farm of land through which a railroad passed, and also of that part thereof which such railroad occupied and upon which it was constructed, which ownership was derived by and through a warranty deed to him from the assignor of the plaintiff, recovered from such railroad or its receiver the sum of \$1,000 as a compensation for the fee of the land which

the road occupied, and for the depreciation in value of the entire farm by reason of such title being acquired to the strip occupied by the railroad:

Held, that the defendant's right to such damages was perfect through the deed from the plaintiff's assignor, which the reservation therein contained in favor of the grantor did not and could not reserve to such grantor, because such a reservation would be inconsistent with and repugnant to the deed and the estate in fee which it conveyed to the defendant; and as the defendant recovered such damages for himself and not for the plaintiff, the latter cannot maintain this action which rests upon the theory that the moneys paid to the defendant therefor were received to and for the use of the plaintiff. (*Id.*)

DEFAULT.

See PRACTICE.

Negley agt. The Counting Room, ante, 237.

DEFENSE.

1. As a distinction exists between a defense and a counter-claim, when the defense is intended as a counter-claim, it should be explicitly stated in the answer, so as to advise the opposite party, and in the absence of such an allegation, especially when the party defines and characterizes his answer as a defense, and it is uncertain whether a counter-claim is intended, such party is not in a position to insist that he has actually set up a counter-claim, and the answer should be construed and considered a defense. (*Ward agt. Comegys et al., ante, 429.*)
2. A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff if the plaintiff had not sued the defendant. (*Id.*)

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DENIAL.

1. Where it appeared that a certain lot in Greenwood cemetery was purchased by the husband of the plaintiff as a burial lot for herself, her husband and their family, and that it had been greatly improved, not only at his but at her expense, and their family dead had been placed in the lot as their final resting place:

Held, that these facts were sufficient to disable the husband from afterwards conveying it away to another person, and thereby devoting it to a distinct and different purpose. The plaintiff had become so far interested in the property by its improvement and the interment of her parents as to prevent her husband from making a legal or valid sale of it. (*Schroeder agt. Wanzor, ante, 13.*)

2. The case of *Thompson agt. Hickey* (8 Abb. N. C., 159; opinion by VAN VORST, J.) cited with approval. (*Id.*)
3. A denial in an answer "on information and belief of all the allegations in the complaint contained not hereinbefore admitted or denied and not containing the allegation that the defendant had not sufficient knowledge or information to form a belief as to the other statements in the complaint, and for that reason he denied them, does not put in issue a material allegation of the complaint, and all such allegations will be taken as admitted. (*Id.*)

DISCOVERY.

1. A county judge having, upon the application of a creditor, made an order requiring insolvent debtors and their general assignee to appear before him and be examined, as provided by section 21 of chapter 466 of 1877, the assignors and assignee moved to vacate the order, upon the ground

that some twenty creditors had commenced actions for the purpose of putting their claims in judgment and that the deponent believed that the said creditors intended to bring an action to set aside the assignment, and that this application was made in the interest of the said creditors and not for the benefit of the assigned estate: *Held*, that the motion to vacate the order was properly denied. (*Matter of Wilkinson, 86 Hun, 184.*)

DIVORCE.

1. The court has no power to punish a husband as for a contempt for non-payment of costs and counsel fee, which he was directed to pay by the final judgment in an action for separation. Such costs and counsel fee should be collected by execution. (*Jacquin agt. Jacquin, ante, 206.*)
2. Condonation of adultery by subsequent cohabitation with knowledge does not bar an after-brought action for divorce predicated on such adultery, where the condonation is upon the promise by the guilty party (the husband) that he would in all things thereafter treat his wife kindly and in a proper manner, and would be in all things a good and affectionate husband to her, when such promise has been violated. (*Timerson agt. Timerson, ante, 526.*)

See INSURANCE (LIFE).

Goldsmith agt. Union Mutual Life Ins. Co., ante, 32.

DOMICILE.

1. Under section 3343, subdivision 18 of the Code of Civil Procedure, the location of a federal corporation is determined by the place of its principal office. Its domicile is where its principal office is. (*Rosenbaum agt. Union Pacific Railway Co., ante, 45.*)

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DOWER.

1. Where provision by a will is made for a woman in lieu of dower, she is required by statute to make an election between the provision and the dower, and she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof. (*Aken agt. Kellogg and others, ante, 136.*)
2. Alleged fraud cannot alter or change the statute. Fraud may relieve a person from an agreement, but it cannot extend the statute for bringing an action or making an election. If an actionable fraud has been perpetrated, damages by way of compensation may be awarded, but the court cannot relieve from a statute bar. (*Id.*)
3. Where the complaint alleged fraud, there should also be an averment that the statement made to the plaintiff was for the interest or purpose of influencing her action, as the fraud is not a statement of a fact, but the expression of an opinion. (*Id.*)
4. Where a wife has received a part of the income of the estate under the will, she is in no condition to repudiate the election which she made without restoring or offering to restore its fruits. (*Id.*)
5. Where a testator devised one-third of his real property to his widow for life with remainder to his sons, also devising the other two-thirds to the sons:
Held, that there was thus a total disposition of his realty, and any allowance of dower to the widow in addition to the devise would overturn the plain scheme of the will, and is inconsistent with the disposition made of the rest of

the estate. In such case the court infers an intention of the testator that the provision for the wife should be in lieu of dower. (*Mason agt. Mason et al., ante, 514.*)

6. That the testator has left his widow a life estate in one-third of the premises does not prevent the owners in fee of the two-thirds from partitioning the property and realizing their shares. The rights of the tenant for life may be protected by provision in the decree. (*Id.*)

See WILL.

Cole agt. Cole et al., ante, 516.

EJECTMENT.

See COMRA.

Coon agt. Diefendorf, ante, 389.

ELECTION LAW.

1. Under the general election laws the return of the results of an election to be given to or filed with the supervisor of the town or ward in which the election was held, must be the original return and not a mere certified copy. (*The People agt. Wise, ante, 92.*)
2. Accordingly, where it appeared on the face of an indictment that a copy of a return was given to and filed with the supervisor of a ward, and that it was mutilated by him no offense is shown under section 94 of the Penal Code, as it was not filed or deposited with him "by authority of law." (*Id.*)
3. To constitute an offense against a statute for the protection of a document or paper of any kind, it must appear to be the kind of document or paper specified in the statute. (*Id.*)
4. Under the act relating to the registration of voters in the city and

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county of New York, it is the duty of the inspectors to register every duly qualified voter who presents himself within the place of registration before the hour of nine o'clock in the evening and demands to be sworn, and the true construction of the statute is that the place of registration shall be closed at that hour, but not that the inspectors shall refuse after that hour to register those who have applied within the time prescribed by law. (*The People ex rel. Cass et al. agt. Hosmer et al., ante, 472.*)

EVIDENCE.

1. An agreement of purchase and sale reduced to writing, &c., is not at all necessary when an action is brought to recover an agreed price for lands actually sold and conveyed pursuant to an oral agreement, when the consideration remains unpaid. (*McKenna agt. Bolger, ante, 411.*)
2. A party is not precluded from testifying to extraneous facts, which tend to show that one who has testified to such a transaction has testified falsely, or that it is improbable that his statement can be true. (*Id.*)
3. It is not the intention of the Code (*sec. 821*) to prevent a party to a suit from testifying to any extrinsic fact that tends to contradict a witness who swears to transactions or communications had between such party and a deceased person, even where he cannot directly testify that no such conversation or transaction was ever had. (*Id.*)
4. It was not the intention to prevent the contradiction of a living witness, but to prevent a living party to a transaction or communication from testifying to it himself when death has closed the mouth of the other party. (*Id.*)
5. So when a living witness swears to a contract made by a defendant with a deceased party at a specified time or place, there is nothing in the Code to prevent the defendant from testifying that at the time named he was in Europe or at some distant place, rendering it impossible that the witness speaks the truth. (*Id.*)
6. Where husband and wife board at a hotel the husband is presumptively liable for the bill, but it is competent for the hotel-keeper to show that the husband was impecunious, and that credit was given to the wife so as to justify the detention of her property by virtue of the hotel-keeper's lien. (*Burney agt. Wheaton, ante, 519.*)

See INDIAN LEASES.

Baker agt. Johns, ante, 464.

7. In this action, brought to recover the value of services rendered by the plaintiff to the defendant's intestate prior to February 7, 1882, the defense of payment was pleaded. Upon the trial the defendant produced a receipt executed by the plaintiff by which she acknowledged the receipt of fifty dollars from the intestate in full of all demands, of whatsoever nature or kind, "up to date February 11, 1882," and proved that she had delivered it to the deceased. The plaintiff was then allowed, against the defendant's objection and exception, to answer the following question: "Please state what, if anything, has been done to that receipt since you signed it and delivered it to the intestate?" She answered, "In full of all demands, of whatsoever nature or kind, up to date, February 11, 1882, has been added since. That was added after he took it from my hands; those were not on when I signed it." *Held*, that the evidence was inadmissible as relating to a personal transaction between the witness

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and the deceased. (*Boughton* agt. *Bogardus*, 85 Hun, 198.)

8. After the plaintiff had, under the objection and exception of the defendant, read various entries from her account book showing payments by the deceased to her to apply in part payment for the services rendered by her, she was asked, and against the defendant's objection and exception, allowed to answer the following question: "That is all he has ever paid you except the fifty dollars you gave him a receipt for?" *Held*, that the evidence was inadmissible, under section 829 of the Code of Civil Procedure, as it tended to contradict the claim of the defendant that a larger amount had been paid to her by the deceased. (*Id.*)
9. In an action of partition brought by a daughter and a granddaughter of the deceased owner against his son and widow, the latter interposed no answer, while the son alleged that land had been conveyed by the deceased to the granddaughter's father, as an advancement, and that the same should be set off against the share to be allotted to her. Upon the trial the son sought to prove by the widow who joined in the deed to the deceased son, that it was given without consideration, as an advancement: *Held*, that it was error to reject the evidence as inadmissible under section 829 of the Code of Civil Procedure. (*Moore* agt. *Oviatt*, 85 Hun, 216.)
10. The words "interested in the event," as used in the said section, are to be limited in their application to the particular issue or question as to which the witness is to be examined. (*Id.*)
11. Upon the trial of this action a son of the intestate entitled to share in his estate was called by the plaintiff. After he had stated his age, occupation and residence, the defendant's counsel objected to the competency of the witness to testify under section 829 of the Code of Civil Procedure. The objection was overruled and the witness allowed to testify. Parts of his testimony related to personal transactions and communications with the deceased, and part did not: *Held*, that the defendant's objection was too general to enable him to raise any question upon appeal. (*Riggs* agt. *American Home Mis. Society*, 85 Hun, 656.)
12. He should have renewed his objection when the objectionable testimony was given, or subsequently moved to have it stricken out. (*Id.*)
13. Where, in an action to recover damages sustained by the plaintiff by being bitten by a dog belonging to the defendant, the facts that the plaintiff was bitten, and that the defendant knew that the dog had previously bitten another person, have been established, witnesses called by the defendant cannot be allowed to testify that when they had seen the dog they had seen nothing malicious in his conduct nor any attempt made by him to bite any one. (*Caldwell* agt. *Snook*, 85 Hun, 78.)
14. Deed — prior oral agreements are merged in it — an agreement affecting the title to land must be in writing. (*See De Witt* agt. *Van Schoyk*, 85 Hun, 103.)
15. Trial for murder in the first degree — defense of an *alibi* — it is error to charge that it is a suspicious defense — what evidence may be admitted to sustain the defense. (*See People* agt. *Kelly*, 85 Hun, 295.)
16. Examination of a party before trial — when not refused because it might tend to show the party to be guilty of a criminal offense — Code of Civil Procedure, sec. 870. (*See Davies* agt. *Fish*, 85 Hun, 480.)

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17. Slander — privileged communication — what is — when actual malice must be proved — an unsustained justification is not evidence of malice. (*See Decker agt. Gaylord*, 35 Hun, 584.)
18. When the title of a purchaser will not be affected by declarations or admissions made by his grantor, while owning the land — as to the right to draw water from a spring upon the land of another. (*See Root agt. Wadhams*, 35 Hun, 57.)
19. Commercial custom — when admissible to show the effect of a particular form of check. (*See Sims agt. U. S. Trust Company*, 35 Hun, 533.)
20. Appraisals of damages for land taken for a railroad — reversed because of the reception of evidence of benefit to adjoining land — when the error is not cured by statements in the report showing that it was not affected by it. (*See Matter of N. Y., W. S. and B. R. Co.*, 35 Hun, 260.)
21. Obstruction of a navigable stream by the defendant — the burden of proving the right to obstruct it rests upon the defendant. (*See Doxey agt. Long Island R. R. Co.*, 35 Hun, 362.)
22. What facts do not justify the presumption of death. (*See Jenkins agt. Young*, 35 Hun, 569.)
23. General exception to evidence — when it is unavailing. (*See Uerts agt. Singer Mfg. Co.*, 35 Hun, 116.)
24. To show what effect the publication of a libel had upon those who read it. (*See Libel*, 35 Hun.)
25. In an action to recover the value of personal services, where the complaint alleges that an agreed price was to be paid therefor, and that they were worth that price, and the issue is what was the agreed price, evidence of the value of the services is competent, as bearing upon the probable truth of the claims of the respective parties. (*Cornish agt. Graff*, 36 Hun, 160.)
26. Proceedings to review erroneous assessments — 1880, chap. 269 — the earning capacity of real estate is a test of its value — review of a decision of the special term on appeal — how objections to the reception of evidence should be stated — erroneous admission of evidence — when the decision will not be reversed therefor. (*See People ex rel. Railroad agt. Keator*, 36 Hun, 592.)
27. What inadmissible as involving a personal transaction between a party and a deceased person — Code of Civil Procedure, sec. 829. (*See Oliver agt. Frelich*, 36 Hun, 683.)
28. When expert testimony as to the injury caused to the market value of a horse by its having run away is inadmissible — how the injury should be proved. (*See Van Wagoner agt. New York Cement Co.*, 36 Hun, 552.)
29. Malpractice by an attorney — what constitutes it — what evidence is admissible to establish it. (*See Carter agt. Talcott*, 36 Hun, 893.)
30. Representations by a director of a company to induce a purchase of its bonds — upon what statements the jury may find him to be liable in damages, if such statements are false. (*See Drake agt. Grant*, 36 Hun, 464.)
31. Action to set aside a fraudulent conveyance — the burden of proving fraud rests on the plaintiff. (*See Remington Paper Co. agt. O'Dougherty*, 36 Hun, 79.)
32. Bond of indemnity to a sheriff — what is evidence of the exercise by the sheriff of his judg-

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ment in making a levy. (*See O'Donohue* agt. *Simmons*, 36 *Hun*, 381.)

33. Sale of an interest in a partnership business—what is included in it—evidence of prior agreements is not admissible to contradict a written one—nor can the subsequent conduct of the parties be shown. (*See Albright* agt. *Voorhies*, 36 *Hun*, 437.)

34. Power of the legislature to make tax deeds conclusive evidence of the regularity of the proceedings. (*See Chamberlain* agt. *Taylor*, 36 *Hun*, 24.)

35. Obstructions to light, air and access to land, by an elevated railroad—measure of damages—opinion of a real estate broker as to such damages. (*See Hins* agt. *N. Y. Elevated R. R. Co.*, 36 *Hun*, 293.)

36. Negligence—burden of proof in an action against a common carrier—when it may be inferred from the accident itself. (*See Murphy* agt. *Coney Island and B. R. R. Co.*, 36 *Hun*, 199.)

37. Civil damage act—action by a father for an injury to his son—what proof of an injury to the father's means of support must be given. (*See Stevens* agt. *Cheney*, 36 *Hun*, 1.)

38. Testimony of a witness as to the genuineness of a signature—right of a party to cross-examine him as to the difference between the signature in question and a genuine signature—1880, chap. 36. (*See Winnie* agt. *Tousley*, 36 *Hun*, 190.)

EXCEPTIONS.

1. At the close of the testimony in this case the counsel for the defendant submitted to the court an unnecessary and unreasonable number of requests to charge.

The court not having embodied all these requests in its charge, the counsel for the defendant said: "I desire to call your honor's attention to certain propositions embodied in the written requests to charge which I have submitted"—the court here said: "I decline to charge further than I have already," to which the defendant excepted: *Held*, that the exception was well taken; that the counsel was entitled to distinguish and point out the specific propositions he desired to have charged. (*De Bont* agt. *Albert Palmer Co.*, 35 *Hun*, 386.)

2. Where upon trial exceptions are, without objection, ordered to be heard at first instance at General Term, the party succeeding at General Term may not object to a review of its decision here, on the ground that the case was not one proper to be so heard. (*Wyckoff* agt. *De Graaf*, 98 *N. Y.*, 134.)

3. This court, on appeal in criminal actions, may not consider objections to portions of the charge as to which no exceptions were taken on the trial. (*People* agt. *Mills*, 98 *N. Y.*, 176.)

4. Upon trial before a court or referee an exception to a general finding of law, holding that one party is entitled to recover against the other, raises the question as to whether, upon all the facts found, the successful party was entitled to judgment. (*Hemmingway* agt. *Poucher*, 98 *N. Y.*, 281.)

5. Where improper evidence has been received under objection and exception, which subsequently, on motion of the party against whom it was offered, is stricken out, this is to be deemed an abandonment of the exception, and such party may not have the benefit of it on appeal. (*Price* agt. *Brown*, 98 *N. Y.*, 388.)

6. Although, on appeal from a

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judgment, in an action tried by the court, no exceptions appear to the findings of fact, or error in their determination, but the general term draws a different legal conclusion therefrom than that of the trial court. this does not authorize it to render a final judgment in accordance with its own conclusion. Whenever the character of the issues framed by the pleading is such that, upon a new trial, it will be possible for the respondent to recover, a new trial should be ordered. Having succeeded on the trial, he is not required to procure the appearance of exceptions upon the record, and so the appellate court cannot determine that there were no exceptions or errors. (*Thomas* agt. *N. Y. L. Ins. Co.*, 99 *N. Y.*, 250.)

EXECUTION.

1. This action was brought against the sureties upon an undertaking given to indemnify the sheriff when making a levy under an execution upon property alleged to belong to the judgment debtor named therein. The undertaking was conditioned that if the obligors should well and truly save, keep and bear harmless and indemnify the said William C. Conner, and all persons aiding and assisting him in the premises from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments, &c., that should arise or be brought against him for or by reason of the levy, or of any sale made thereunder of any property which he should judge belonged to the judgment debtor, then the obligation to be void, else to remain in full force and virtue. After the property had been seized a judgment for the value thereof was recovered by the true owner against the sheriff: *Held*, that as the defendants had entered into an absolute agreement to protect the sheriff against any judgment that

might be recovered, they were concluded by the judgment which had been recovered against him although they had no notice of the action. (*Conner* agt. *Reeves*, 35 *Hun*, 507.)

2. That it was not necessary for the sheriff to show that he had paid the judgment which had been so recovered. (*Id.*)

3. That in the absence of any charge of collusion or fraud, the effect of the judgment so recovered was not impaired by reason of the fact that it was entered by consent given in open court. (*Id.*)

4. An execution having been issued upon a judgment recovered against a defendant, the sheriff, shortly before the expiration of the sixty days within which it was to be returned, commenced to advertise for sale certain real property alleged to belong to the defendant. After the expiration of the sixty days, and prior to the day of sale, the sheriff made a return in which he stated that he had collected nothing under the execution, and had not found any personal property out of which the execution could be made, but that he had levied upon certain real estate and advertised the same for sale. Upon this return the plaintiff procured an order for the examination of the defendant in proceedings supplementary to execution: *Held*, that the return was not such as to justify the granting of the order. (*Marx* agt. *Spaulding*, 35 *Hun*, 478.)

5. That the question as to whether or not the sheriff should not have made the return in the form required by law, should not be decided upon affidavits presented upon the application for the order. (*Id.*)

6. This action was brought to recover damages for the conversion of certain wheat which had been

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- sold under an execution issued upon a judgment recovered by the defendant against the plaintiff. The wheat was raised upon a farm occupied by the plaintiff, and which had been devised by his father to his son Abram, to be held in trust for and during the natural life of the plaintiff, for his benefit or that of his family. The will provided that if the said Abram and another son, Guy, should think it would be for the best good of the plaintiff or his family, they might allow the plaintiff to occupy the farm without rent, but the term was not to be for more than a year at a time. The trustee and Guy were authorized to lease the farm to other persons, or to sell and invest the proceeds, and appropriate the interest or income of the estate to and for the benefit of the said William or his family: *Held*, that even if the trust were assumed to be valid, yet, as the wheat was in part the product of the plaintiff's own skill and labor, it could not be held entitled to the exemption accorded to the trust estate. (*Salisbury* agt *Parsons*, 36 Hun, 12.)
7. That if the trust were invalid, the wheat was not exempt from execution, under section 1390 of the Code of Civil Procedure, as necessary "flour and vegetables, actually provided for family use," as "wheat" is not "flour" with in the meaning of that section. (*Id.*)
8. That it was not exempt under the §250 clause of section 1391 of the Code of Civil Procedure, as that related only to necessary household furniture, working tools and teams, professional instruments, furniture and library. (*Id.*)
9. It seems that the trust was invalid, and that the title to the farm was vested in the plaintiff. (*Id.*)
10. Where an execution issued against the person of a judgment debtor is defective, in that it fails to specify by name the county to which an execution against property has been issued and returned unsatisfied, the defect may be cured by an amendment to the execution, to be ordered by the court under section 723 of the Code of Civil Procedure: *Quære*, as to whether it is sufficient to recite in the execution against the person "that an execution against the property of the judgment debtor has been duly issued to the sheriff of the county where the said judgment debtor resides, and returned unsatisfied." (*Waller* agt. *Isaacs*, 36 Hun, 233.)
11. Upon vacating an execution against the person for irregularities therein, the court may compel the defendant to stipulate that he will not sue for the arrest, or for false imprisonment under the execution. (*Id.*)
12. The plaintiff, having been appointed a receiver of the property of one Rowell in supplementary proceedings instituted upon a judgment recovered against him, brought this action to recover from the defendant bank the amount of a deposit held by it for the said Rowell. The deposit consisted of pension money received by Rowell and deposited with the bank, partly in cash and partly in a check or draft of the pension agent, under an agreement that interest should be allowed thereon: *Held*, that the fund was exempt from execution under section 1393 of the Code of Civil Procedure. (*Stockwell* agt. *Nat. Bank of Malone*, 36 Hun, 588.)
13. Section 4 of chapter 96 of 1837, authorizing the recorder of the city of Oswego to "exercise any power or authority in any proceedings supplementary to execution in the county of Oswego,

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- which the county judge or a justice of the supreme court can exercise therein, whether such supplementary proceedings be in an action in said recorder's court or in any other court," was not repealed by the adoption of the Code of Civil Procedure, either expressly or by implication, and the recorder of that city still has power to entertain such proceedings and to appoint therein a receiver of the property of the judgment debtor. (*Ross* agt. *Wigg*, 36 *Hun*, 107.)
14. When a stay of execution on a foreign judgment, given by the foreign state, is operative upon proceedings on the judgment in this state. (*See Nuzzo* agt. *McCallmont Oil Co.*, 36 *Hun*, 296.)
15. The death of the plaintiff after its issue does not suspend its operation—errors in the form of a constable's bond—when the sureties cannot avail themselves of them as a defense. (*See Jones* agt. *Newman*, 86 *Hun*, 634.)
16. In an action wherein an attachment had been issued, upon the ground that defendant, a resident of the state, had departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, the execution directed the sheriff to collect the judgment out of the attached personal property, and if that was insufficient, out of the real estate attached: *Held*, that, so far as the real estate was concerned, the execution was void, and a sale under it conveyed no title; that the provision of the Code of Civil Procedure (*sec.* 1370, *subd.* 2) prescribing the form of execution in such case, is peremptory, and the attached real estate could not be resorted to until the remedy against the debtor's personal property, both attached and unattached, had been exhausted. (*Place* agt. *Riley*, 98 *N. Y.*, 1.)
17. *It seems* that where the attachment, judgment and execution are regular, a *bona fide* purchaser on sale acquires a good title, although after a conveyance to him the defendant is allowed to come in and defend as authorized by the Code (*sec.* 445) and succeeds in his defense. (*Id.*)
18. Under a void process, however, no title can be acquired, and a *bona fide* purchaser, as against the owner of the property, stands in no better position than one purchasing with full knowledge of the invalidity. (*Id.*)
19. Although an execution is regular on its face, if it be in fact unauthorized and void the sheriff may refuse to execute it, and proof of its invalidity establishes a good defense in an action against him for such refusal. (*Reid* agt. *Stegman*, 90 *N. Y.*, 646.)

EXECUTORS AND ADMINISTRATORS.

1. Where there are two or more persons equally entitled under section 2643 of the Code, to receive letters of administration, with will annexed, the surrogate will appoint that person who *ceteris paribus* has the largest interest under the will. (*In the Estate of Charles Morgan, deceased, ante*, 194.)
2. Section 84, title 2, chapter 6, part 2, Revised Statutes, which declares that joint "administration" may, with the consent of persons entitled, be granted to themselves and to other persons not entitled, applies to cases of administration with the will annexed. (*Id.*)
3. Full commissions should be allowed executors or trustees on receiving and paying out the income, notwithstanding the trustee has received full commissions on a former accounting for receiving

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- and investing the principal. (*Matter of Goodrich, ante, 291.*)
4. The surrogate cannot justly permit an executor or trustee to resign his trust against the wishes of the legatees or *cestuis que trustent*, unless sufficient reasons are shown to exist for allowing such resignation. (*In the Estate of John Baier, deceased, ante, 323.*)
 5. Where a will presents upon its face questions of complication, uncertainty and difficulty, an executor may institute and maintain an action for the purpose of obtaining a judicial construction thereof, and for direction to him as to the manner in which he should discharge his duties in executing the will as such executor. (*Bigart agt. Jones, ante, 491.*)
 6. In an action of ejectment, brought by one of the heirs-at-law of one Jenkins, who died intestate in 1863, it appeared that the defendants claimed under a sale of the intestate's real estate made pursuant to an order of a surrogate in 1871. In the petition for the order directing the sale, which was made by the administrator, the name of the plaintiff in the present action was not mentioned, nor was any notice of the proceedings given to him: *Held*, that the failure to mention the name of the plaintiff in the petition, or to give him notice of the proceedings, invalidated the sale. (*Jenkins agt. Young, 35 Hun, 569.*)
 7. That the said omissions were not such omissions or defects as were embraced within the intent of section 2 of chapter 82 of 1850, providing that no such sale "shall be invalidated, nor in any wise impeached, for any omission or defect in any petition of any executor or administrator," etc. (*Id.*)
 8. That the plaintiff's right to maintain the action was not taken away by section 1 of chapter 92, of 1872, amending section 3 of chapter 82 of 1850, which provides that no such sale "shall be invalidated, nor in any wise impeached, * * * after a lapse of five years from the time of such sale, where the notice of such sale has been published for six weeks successively before the day of such sale, although such publication may not have been for the full period of forty-two days." (*Id.*)
 9. That this act was not intended to operate as a general limitation of the time within which such an action as the present one might be brought, but only to bar after five years actions brought to invalidate a sale because of the defect in publication, particularly referred to in the act. (*Id.*)
 10. In an affidavit used in March, 1871, to show the service of a citation to show cause why an administrator of Jenkins' estate should not be appointed, it was stated that "it was reported that the said Charles Jenkins (the plaintiff) was dead, by his friends, and that his last place of residence could not be ascertained." *Held*, that this did not justify the surrogate in presuming that he was dead, in the proceedings instituted before the surrogate for the sale of real estate. (*Id.*)

FEES.

1. The act (chapter 279 of the Laws of 1884), is not sufficient to authorize the board of estimate and apportionment to fix the fees, percentages and allowances of the present sheriff, during his term of office, at the rates set forth in their resolution of December 29, 1884, for services thereafter to be rendered. (*Davidson agt. The Mayor, &c., of New York, ante, 182.*)
2. The act construed as not authorizing any interference with the fees of the then incumbent of the sher-

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iff's office, but the fixing of compensation authorized deemed to apply to his successors in office. (*Id.*)

3. In an action for divorce on the ground of alleged cruelty, brought by a wife against her husband, even where the wife prevails, the defendant, the husband, will be compelled to take up the report and pay the referee's fees. (*Early agt. Early, ante, 239.*)

FINDINGS OF LAW AND FACT.

1. Where, in an equity action, questions of fraud are submitted to and passed upon by a jury which have no relevancy to the issues presented by the pleadings, and are not involved in the judgment, they are not conclusive upon the parties in a subsequent action. (*Lorillard agt. Clyde, 90 N. Y., 196.*)
2. It seems that where the findings of a trial court are apparently inconsistent, it is the duty of the appellate court, if possible, to reconcile them and give effect to the real meaning and intent of the court in making them. (*Health Department agt. Purdon, 90 N. Y., 237.*)

GENERAL TERM.

1. Although on appeal from a judgment, in an action tried by the court, no exceptions appear to the findings of fact, or error in their determination, but the general term draws a different legal conclusion therefrom than that of the trial court, this does not authorize it to render a final judgment in accordance with its own conclusion. Whenever the character of the issues framed by the pleading is such that, upon a new trial, it will be possible for the respondent to recover, a new trial should be ordered. Having succeeded on the trial, he is not required to procure the appearance of exceptions

upon the record, and so the appellate court cannot determine that there were no exceptions or errors. (*Thomas agt. N. Y. Life Ins. Co., 90 N. Y., 250.*)

2. When an order of general term reversing a judgment of conviction in a criminal action, omits to show that the court exercised its discretion and refused a new trial upon the facts and granted it only for error of law, it is not reviewable here. (*People agt. Poucher, 99 N. Y., 610.*)

GUARDIAN.

1. In a controversy over probate a special guardian of an infant interested in the estate should not be appointed upon the nomination of the proponent; nor should any person be appointed such guardian who is associated in business with the proponent's attorney or counsel. (*Matter of Henry, ante, 250.*)
2. Rule 10 of the surrogate's court must be strictly enforced, unless perhaps when it is clearly apparent that the interests of the infant will be best subserved by the establishment of the disputed paper as a will. In case a special guardian has been inadvertently appointed in disregard of Rule 10 he should be superseded. (*Id.*)
3. One who is a lawful incumbent of the office of guardian, either by appointment of the surrogate or by virtue of a testamentary provision, can successfully resist in this court an application for his removal until such facts and circumstances have been established as furnish statutory warrant for his suppression. (*Matter of King, ante, 307.*)
4. If, within the meaning of subdivision 2 of section 2817 of the Code of Civil Procedure, a guardian has been guilty of "misconduct in the execution of her

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trust," and has thereby become "unfit" to be continued in her office, she must be removed; otherwise the surrogate is powerless to displace her. (*Id.*)

HUSBAND AND WIFE.

1. Business partnerships between husband and wife are not authorized. (*Jacquin agt. Jacquin, ante, 51.*)
2. Therefore a husband cannot claim under a business copartnership with his wife, the right to a dissolution of the same and the appointment of a receiver. (*Id.*)
3. This is adverse to *Zimmerman agt. Erhard and Dodge* (59 *How.*, 11); and *Graff et al. agt. Kinney* (1 *How. [N. S.]*, 59); see, also, *Flurlee agt. Bloomingdale* (67 *How.*, 292). (*Id.*)
4. In a suit to recover for moneys advanced to the wife of the defendant, where evidence was given tending to show that some portion of such advances was made for the purpose of procuring necessities of food and clothing, it was a question of fact for the jury to determine whether or not such advances were made because of the wife's necessities, and under such circumstances that the same should be chargeable to the husband. (*Wells agt. Lachenmeyer, ante, 252.*)

IMPRISONED DEBTOR.

1. Where the petitioner was arrested for converting to his own use moneys and securities belonging to the plaintiff, while acting in a fiduciary capacity, and was imprisoned in default of bail, and on his application for a discharge his examination showed that in violation of his trust he had used the money and property for his own benefit:

Held, that he was entitled to his discharge, because it did not appear that he had disposed or made over any part of his *own* property, with a view to the future benefit of himself or his family, or with intent to injure or defraud any of his creditors. (*Matter of Caamano, ante, 240.*)

INDIAN LEASES.

1. By the act of congress, approved February 15, 1875, it was provided that the then existing Indian leases should be valid and binding for the term of five years thereafter, unless by the terms thereof they expired before that time. The same act gave the holder of such leases the right to a renewal thereof in case he was the owner of "improvements erected upon" the land leased. (*Baker agt. Johns, ante, 404.*)
2. George Jemison, a Seneca Indian, residing on the reservation, made to the plaintiff a lease of certain premises (of which those in question are a part) for the term of twelve years, and on the 16th day of June, 1875, the same Jemison executed and delivered to the defendant Johns a lease of the land in question, and the defendant Netz is his tenant, and in possession. Under the act of congress the defendant Johns made application to the council of the Seneca nation on the 25th December, 1879, for renewal of his lease which was granted and lease made of that date, and on 20th day of January, 1880, the plaintiff made a like application for renewal of her lease, which was granted by the councilors, and lease made of date of May 8, 1880, which included the land in lease to defendant. In action of ejectment by plaintiff, to recover the land held by defendant:

Held, first, that plaintiff had made improvements on the land covered by her lease, and within the mean-

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ing of the act of congress was the owner of them, and therefore entitled to a renewal of her lease.

Second. That the leases to the plaintiff and defendant Johns were in the strict legal sense invalid prior to the act of congress of 1875, and that they had no legal rights in respect to the leased premises, except that afforded by possession, but that act confirmed and made leases then outstanding valid, and established rights under them as effectually as of the time of their execution as if they had been made by persons competent to vest the rights they purported to give. In that view the plaintiff became the lessee of the entire premises covered by her lease by the force of the act from the time it was made, and that to the defendant Johns was ineffectual to vest in him any right to the land embraced in it.

Third. That the plaintiff was entitled to renewal of her lease entire, and the continued possession of the premises covered by it, and the defendant Johns had in fact no existing lease, and no right to any renewal in respect to the premises in question, unless the plaintiff had relinquished them to him in such sense that he might be treated as in possession as her lessee or assignee.

Fourth. That the provision in the act of congress for renewal of leases to persons who own improvements, has reference to those only who at the time the application is made, lawfully claim under a lease, or under some one who has taken a lease which is then valid, and does not include one who has unlawfully as against such leaseholder (entitled to renewal), entered and made improvements upon some portion of the premises.

Fifth. That it is conclusively established by adjudication that the defendant Johns derived no right to possession of the premises from the plaintiff, and he had no position which enabled or permitted him as against the plaintiff to apply for or take the renewal lease

under which he claims, but the right was exclusively in the plaintiff to have a renewal lease covering the entire premises embraced within that first taken by her.

Sixth. That as it was the custom, and had been for years, of the council of the Seneca nation to assemble for the transaction of its business, and the action of the council when so assembled was governed by rules and by-laws, and a formal record of the proceedings was kept in a book by the clerk, a copy of such record certified by him is competent evidence. (*Id.*)

INDICTMENT.

1. The provisions of the Code of Criminal Procedure relating to indictments should be construed with the common-law principles of pleading, and where no provision is made by the Code, the common-law rule should prevail. (*The People* agt. *Wise*, ante, 92.)
2. The Code has not changed the common-law rule that an indictment must show on its face a criminal offense. (*Id.*)
3. Under the general election laws the return of the results of an election to be given to or filed with the supervisor of the town or ward in which the election was held, must be the original return and not a mere certified copy. (*Id.*)
4. Accordingly, where it appeared on the face of an indictment that a copy of a return was given to and filed with the supervisor of a ward, and that it was mutilated by him, no offense is shown under section 94 of the Penal Code, as it was not filed or deposited with him "by authority of law." (*Id.*)
5. To constitute an offense against a statute for the protection of a document or paper of any kind, it must appear to be the kind of document or paper specified in the statute. (*Id.*)

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6. Section 649 of the Penal Code covers only cases of a messenger appointed by authority of law, or any person who interferes with such messenger. (*Id.*)
7. Repugnancy (there being two inconsistent allegations in one pleading) is a fatal objection to an indictment since, as before the Code of Criminal Procedure. (*Id.*)
8. Cases stated as to how and when the words and figures of a document or paper should be set forth in an indictment. (*Id.*)

INJUNCTION.

1. The court may restrain, by injunction, summary proceedings, if the justice goes beyond his jurisdiction, either in taking cognizance of the proceedings or while he is acting in it, and if it appear that the justice who granted the warrant, the enforcement of which is sought to be restrained, was without jurisdiction, the injunction should be continued. (*Kiernan* agt. *Reming*, ante, 89.)
2. A person who has been a hired workman of another, a mere employe for a time, afterwards engaging in the same business of his former employer and occupying a store in the same city, has no right to use the name of such former employer upon his cards, signs, &c., by saying "late with," &c., and such use will be restrained by injunction. (*Van Wyck* agt. *Horowitz*, ante, 279.)

See MINOR CHILDREN.

Armitage agt. *Hoyle et al.*, ante, 438.

3. Agreement not to carry on business within a certain territory — when it will be sustained — a violation of it may be restrained by an injunction, though a specific amount is to be paid by the terms

of the agreement for its breach. (*See Diamond Match Co. agt. Roeder*, 35 *Hun*, 421.)

4. Assessment — when the enforcement thereof will not be enjoined. (*See Mores* agt. *City of Buffalo*, 33 *Hun*, 613.)
5. To restrain interference with a highway. (*See DeWitt* agt. *Van Schoyk*, 35 *Hun*, 103.)

INSURANCE (LIFE).

1. In an action by a husband to reform life insurance policies taken out in favor of his wife, from whom he has since been divorced, on the ground of mistake:
Held, that to justify a reformation the mistake must have been mutual. The divorce from his wife cannot authorize or enable the court to change the conditions and terms of the policies, unless, through a mutual mistake, the intention of both parties have failed of expression. A mistake on one side is not enough. (*Goldsmith* agt. *Union Mutual Life Ins. Co.*, ante, 32.)
2. As the husband accepted these policies at the time they were issued, and has had them in his possession for many years without objection, they are presumed in law to express his intentions. If for any reason he believed them to be wrong, he should have declined to pay the premiums upon them year after year. Such voluntary payments are an adoption of the terms of the policies as issued. (*Id.*)
3. As to the effect of the decree of divorce upon the rights of the divorced wife under the policies, *quære*. (*Id.*)
4. In an action upon a policy of life insurance where the contract was based upon a written application made by the insured and

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presented to the company in which the applicant made representations as to the state of his health at that time and previous thereto. In reply to an interrogatory, the insured stated that he had never been insane. Another question in the application was: "Have they (parents, brothers or sisters) died of, or been afflicted with insanity, epilepsy * * * or other hereditary disease?" to which he answered no. The policy contained an express condition and agreement that all the answers, statements and representations should constitute a part of the contract and were warranted by the insured to be true in all respects, and if they were not, then the contract to be absolutely null and void. One of the defenses interposed by the company was that a sister of the insured was, and had been at the time the application was made and the policy issued, insane, and evidence was given to prove the truth of the answer:

Held, that if it was a fact that the sister was, or had been, at time of the application, insane, and the same was of a temporary character only produced by physical causes at that time existing, it would not constitute a breach of any condition of the policy and thereby render it void. That to bring the case within the limits of the contract in this respect, so as to constitute a defense and defeat a recovery, it must be made to appear that the insanity which afflicted the sister of the insured, was constitutional and hereditary in its nature and character. (*Westover* agt. *The Aetna Life Insurance Co.*, ante, 163.)

JUDGMENT.

1. The filing of a justice's transcript in the county clerk's office, makes the judgment of the justice a judgment of the county court for all

purposes. (*Spencer* agt. *Wait*, ante, 117.)

2. The statute of limitations applicable to such a judgment, is the statute applicable to judgments rendered in courts of record. (*Id.*)

See PRACTICE.

Negley agt. *The Counting Room Company*, ante, 237.

3. On September 8, 1879, upon the application of one Holmes, against whom a judgment had been docketed on August ninth of that year, his default was set aside and he was allowed to defend the action, the judgment to stand as security for any judgment the plaintiff might thereafter obtain in the action. Before the trial Holmes died, and the plaintiff, his executrix, was substituted in his place, and thereafter a judgment was rendered against her, from which she appealed and procured an order providing that the docket of each of the said judgments be marked suspended upon appeal. After the docket of the second judgment the plaintiff contracted to sell certain lands inherited from Holmes to the defendant in the present action; and after the appeal and the making of the order suspending the lien of the judgments, she tendered a deed thereof to the defendant pursuant to the contract, and upon his refusal to accept it on account of the said liens she brought this action to recover damages for his said refusal: *Held*, that the effect of the order setting aside the default and directing that the judgment already recovered should stand as security for any judgment the plaintiff might thereafter recover was to create a lien upon the land, which justified the defendant in refusing to accept the deed. (*Holmes* agt. *Bush*, 35 *Hun*, 637.)

4. That the said lien was not affected by the order made under section 1256 of the Code of Civil Pro-

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cedure marking the judgments as suspended on appeal. (*Id.*)

5. *Quare*, as to how the said lien should be enforced, whether by a sale of the land under process to be issued by the court or by a suit in equity. (*Id.*)

6. Foreign judgment — service of a summons upon a non-resident in a foreign State, void. (*See Shepard* agt. *Wright*, 35 *Hun*, 444.)

7. But one judgment should be entered where the plaintiff's recovery is so small as to give costs to the defendant — the recovery cannot be assigned so as to prevent the setting off of the lesser against the greater amount. (*See Warden* agt. *Frost*, 35 *Hun*, 141.)

8. Cannot be entered until all the issues are disposed of. (*See Robinson* agt. *Hall*, 35 *Hun*, 214.)

9. Remedy for irregular entry of. (*Id.*)

JUDGMENT DEBTOR.

1. A judgment debtor is not entitled to a discharge from imprisonment under execution, where he has knowingly and intentionally expended upon himself and family for the necessaries and luxuries of life the money which he obtained by fraud from his creditors:

Held, also, that an investment by the debtor in real property in his wife's name, of other moneys subsequently acquired, is in fraud of the creditor, and will defeat a discharge on the ground that the proceedings are not just and fair. (*Matter of Lovell*, ante, 285.)

2. A pretended indebtedness to the wife for borrowed money, where no account thereof has been kept, is no consideration for such investment as against creditors. (*Id.*)

JUDICIAL SALE.

1. Defective service upon an infant — when a judgment entered upon it may be made binding upon the infant by a subsequent judgment — when a purchaser will be compelled to accept a title. (*See Rice* agt. *Barrett*, 35 *Hun*, 366.)

JURISDICTION.

1. Where a judgment was recovered and entered in the city court of New York and execution issued thereon for more than \$3,000, and the excess was remitted and the judgment and execution was amended *nunc pro tunc*. On motion by a subsequent execution creditor to vacate the judgment and execution for want of jurisdiction and other alleged defects and irregularities:

Held, that the jurisdiction of this court extends to any action wherein the complaint demands judgment for a sum of money only, whatever may be the amount claimed. The amount claimed does not affect the jurisdiction of this court. If jurisdiction vests at the commencement of the action, it cannot be ousted by any subsequent act, although entry of judgment for the excess of its jurisdiction may have been an irregularity which the defendant might have objected to, a third party cannot. (*Roof* agt. *Meyer*, ante, 20.)

2. There being no want of jurisdiction, if there are any defects or irregularities in the judgment, or proceedings or execution, they can be taken advantage of only by the defendant. (*Id.*)

3. A paper purporting to be the will of a resident of New Jersey, who died in that state leaving personal property in the county of New York, was propounded in that county for probate. Such paper was not subscribed by its maker,

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but her name appeared in her own handwriting in its opening sentence, which began: "If I, Cecilia L. Booth, should die," &c. (*In the Estate of Cecilia L. Booth, ante, 110.*)

4. The instrument from first to last was written by the decedent while two persons were in attendance at her request for the purpose of attesting it. They duly subscribed their names as witnesses, and she acknowledged in their joint presence that the paper so authenticated was her will, at the same time displaying it so that they saw her name as written upon its face:

Held, that the surrogate of this county had jurisdiction in the premises. (*Id.*)

5. The courts of this state have no jurisdiction for trespass to lands without the state. (*Dodge agt. Colby, ante, 475.*)
6. Of courts, over infants for whom no guardian *ad litem* is appointed. (*See Sims agt. N. Y. College of Dentistry, 35 Hun, 344.*)
7. Of county judge in proceedings for town bonding—when the petition is sufficient. (*See Town of Solon agt. Williamsburgh Savings Bank, 35 Hun, 1.*)
8. An order in supplementary proceedings directed the judgment debtor to deliver to the sheriff a sum of money, which had been paid to him as wages after the institution of the supplementary proceedings. The defendant was a resident of Pennsylvania, and it appeared that the money was in that state: *Held*, that the order was erroneous; that the court had no power to compel the debtor to go out of this state to obtain the money and bring it here. (*Buchanan agt. Hunt, 98 N. Y., 560.*)
9. *It seems* the most the court had

power to do was to require the debtor to transfer his title to the money to a receiver. (*Id.*)

10. A surrogate, on settlement of the accounts of an executor or administrator, who has made advances for the support and maintenance of a minor entitled to a share in the estate, has jurisdiction to determine, upon equitable principles, a claim for such advances; and an allowance is proper where the expenditure for which reimbursement is so sought is such as would have been authorized by the court had application been made in advance. (*Hyland agt. Baator, 98 N. Y., 610.*)

JURY.

1. The action of a jury in getting books of the law and consulting them while engaged in their deliberations in regard to a verdict, although irregular, is not sufficient to warrant a new trial. (*The People agt. Seeley, ante, 105.*)
2. Where there are three counts in an indictment the omission of the jury to render a verdict upon the second and third counts is not such an irregularity as should lead to a new trial, for the omission to find one way or the other is equivalent to an acquittal on those counts, and a judgment as to them is a bar to further prosecution. (*Id.*)
3. If a trial proceeds, and a verdict be rendered without a jury being sworn, such a verdict is not irregular and void, when neither party asked that the oath should be administered. (*Jenkins agt. City of Hudson, ante, 244.*)
4. That which the law requires to be done for the protection of a party, may be waived, and the failure to object is a waiver. Nor

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can failure to object be excused by alleged ignorance. (*Id.*)

See NEGLIGENCE.

Postor agt. *The New York Central and Hudson River Railroad Co.*, ante, 416.

5. Policy of insurance — construction of a clause prohibiting repairs or alterations without consent of the company — when the question as to whether the clause has been violated should be left to the jury. (*See Mack* agt. *Rochester German Ins. Co.*, 35 *Hun*, 75.)

6. Trial for murder in the first degree — when the question of premeditation and deliberation must be left to the jury — errors in the charge — when not cured by a subsequent modification thereof. (*See People* agt. *Kelly*, 35 *Hun*, 295.)

A passenger can only be put off a train at a usual stopping place or near a dwelling-house — when the question whether or not a dwelling-house is "near," within the meaning of the statute, should be submitted to the jury—1850, chap. 140, sec. 35. (*See Loomis* agt. *Jewett*, 35 *Hun*, 313.)

JUSTICE OF THE PEACE.

1. In this action, which was commenced in a justice's court by the service of a summons and a verified complaint, as provided by chapter 414 of 1881, a demurrer interposed by the defendant was overruled with leave to him to answer. The defendant having failed to answer, judgment was entered for the plaintiff for the full amount claimed in the complaint, without any proof thereof being furnished: *Held*, that this was error; that the act of 1881 only authorizes the entry of a judgment without proof, when the defendant fails to answer or demur. When he does either, section 2891 of the Code of Civil

Procedure becomes applicable and prevents the plaintiff from recovering without proving his case. (*Oulman* agt. *Schmidt*, 35 *Hun*, 345.)

2. When a new trial may be had in a county court on appeal from a justice's judgment—Code of Civil Procedure, sec. 3068. (*See Reynolds* agt. *Swick*, 35 *Hun*, 278.)
3. In this action, brought in a justice's court to recover the sum of twenty-five dollars, alleged to be due to the plaintiff from the defendant bank, being a balance of deposits made by him with it, the defenses were, a general denial, a settlement and payment. Upon the trial the plaintiff testified to having made deposits amounting to \$6,128.50, and to having drawn and received back checks amounting to \$5,351.01; but admitted that he had drawn checks, which had been returned to him, for all the money he had deposited except twenty-five dollars, which amount had been paid by the defendant upon a check, which the plaintiff claimed he had not drawn. Upon the defendant's motion, the justice dismissed the complaint upon the ground that the sum total of the accounts of both parties exceeded the sum of \$400: *Held*, that this was error. (*Brisbane* agt. *Bank of Batavia*, 36 *Hun*, 17.)

LACHES.

See SPECIFIC PERFORMANCE.

Johnson and another agt. *Duncan*, ante, 366.

LEGACIES.

1. The primary fund for payment of legacies is personal estate and realty, cannot be charged with the burden unless by express direction or clear intent drawn from the will, aided by outside circumstances, if any there be. (*Reyher* agt. *Reyher and others*, ante, 74.)

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2. The will of R., after directing the payment of his debts, directed his executors to pay to his father, mother, brother and sister, certain sums of money, and then directed that all the rest, residue and remainder of his estate, both real and personal, be equally divided between his daughter and widow, who was appointed executrix, giving her full power to sell and convert all the estate into money. The personal property was insufficient to pay the legacies in full: *Held*, that the legacies were chargeable upon the real estate. (*Id.*)

*See WILL.**Matter of Karr, ante, 405.*

LIMITATIONS OF ACTIONS.

1. This action was brought by the plaintiff to recover damages for an alleged breach of an agreement, whereby the defendant contracted to carry him safely from Herkimer to Mohawk. The plaintiff claimed that by reason of the unfitness of the car used, and of the dangerous proximity of telegraph poles to the tracks, he was struck and injured by one of the said poles while in the car: *Held*, that the action was to "recover damages for a personal injury, resulting from negligence," and was governed by the three years' limitation prescribed by subdivision 5 of section 383 of the Code of Civil Procedure. (*Webber agt. Herkimer and Mohawk Street R. R. Co., 35 Hun, 44.*)
2. Right of a supervisor to sue to recover damages for injuries sustained by a town — an action against railroad commissioners, for the wrongful issue of bonds, accrues when the bonds are issued — it is barred in six years. (*See Mitchell agt. Strough, 36 Hun, 83.*)

MANDAMUS.

1. A writ of *mandamus* is the appropriate remedy by which the common council may be required to consider the estimate and vote the amount thought necessary to carry out the law. (*The People ex rel. Alfred P. Wright agt. The Common Council of the City of Buffalo, ante, 61.*)
2. A citizen and a taxpayer has the power and right to apply for the writ. (*Id.*)
3. It is only when the application for the writ is made to secure some personal or private redress that the applicant must be shown to be interested in obtaining it before the writ can be directed to issue. Where the act omitted to be performed affects the public interests generally, and all citizens are equally concerned in securing its performance, and that has been enjoined by a law of the state, it is sufficient, to support the application, that the applicant is a citizen and entitled to insist upon the execution of the laws of the state. (*Id.*)
4. When a law for repaving a street has been duly passed, proposals to do the work invited, bids received, and by resolution of the contracting board of a city the contract let to the lowest bidder, the proposer has a right to have the proper contract written out in accordance with his bid so accepted, and the board has no right to rescind the resolution awarding the contract. A *mandamus* will issue to compel the execution of the proper contract by the city. (*The People ex rel. Holler agt. The Board of Contract and Apportionment of the City of Albany, ante, 423.*)

*See COURTS.**People ex rel. Cole agt. Board of Supervisors of Greene County, ante, 483.*

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MANUFACTURING CORPORATIONS.

See ABATEMENT AND REVIVOR.*Bonnell* agt. *Griswold*, ante, 451.

MARRIED WOMEN.

1. Where husband and wife board at a hotel the husband is presumptively liable for the bill, but it is competent for the hotel-keeper to show that the husband was impecunious, and that credit was given to the wife so as to justify the detention of her property by virtue of the hotel-keeper's lien. (*Birney* agt. *Wheaton*, ante, 519.)

MINOR CHILDREN.

1. By the Revised Statutes, as amended by chapter 32 of Laws of 1871, a father may by deed or last will duly executed, dispose of the custody and tuition of any child under the age of twenty-one years and unmarried during its minority. (*Armitage* agt. *Hoyle et al.*, ante, 498.)
2. Where a father has by deed duly executed, disposed of the custody and tuition of a minor child, and the person to whom such disposition has been made has accepted the same; an action will lie to enforce the rights of such person, and an injunction will be granted restraining the interference of not only the father, but of all persons acting under him and by his procurement, with the rights of such person to such custody and tuition under said deed. (*Id.*)
3. The injunction in such actions run not only against a party, but also against his attorneys, counselors, agents, &c. (*Id.*)

MOTIONS AND ORDERS.

1. The supreme court cannot obtain jurisdiction to make an order in

an action pending in a justice's court, by a mere notice of motion. (*Matter of Martin*, ante, 26.)

2. A party to an action pending in justices' court, cannot make a motion in the supreme court to control the procedure in such action. (*Id.*)

See PRACTICE.

The National Bank of Port Jervis agt. *Hanse*, ante, 200.)

3. Service of notice of, is not equivalent to an appearance. (*See Valentine* agt. *Myers' Sanitary Depot*, 85 Hun, 201.)
4. It seems that when an order has been made in an action substituting another as plaintiff on the ground of the death of the original plaintiff, it is not requisite to prove upon the trial the death or the right of the person substituted; these facts are necessarily determined in making the order. (*Gibson* agt. *Nat. Park Bk.*, 98 N. Y., 87.)
5. An order vacating a surrogate's decree settling the account of an executor is a final order; its allowance is within the discretion of the court below in cases where the court has jurisdiction; if the court has no jurisdiction it is reviewable here. (*In re Tilden*, 98 N. Y., 434.)
6. An order in supplementary proceedings directed the judgment debtor to deliver to the sheriff a sum of money, which had been paid to him as wages after the institution of the supplementary proceedings. The defendant was a resident of Pennsylvania, and it appeared that the money was in that State: *Held*, that the order was erroneous; that the court had no power to compel the debtor to go out of this state to obtain the money and bring it here. (*Buchanan* agt. *Hunt*, 98 N. Y., 560.)

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7. When an order of general term, reversing a judgment of conviction in a criminal action, omits to show that the court exercised its discretion and refused a new trial upon the facts and granted it only for error of law, it is not reviewable here. (*People* agt. *Poucher*, 99 N. Y., 610.)

MORTGAGE.

1. There is no general rule of law or equity which permits the owner of a junior mortgage to single out one of several parcels covered by his and an older mortgage and redeem that one parcel. His only right is to redeem the whole. The foreclosure of the older mortgage though not valid to cut off the younger is valid as a transfer of the rights of the older mortgagee to the purchaser or purchasers at that sale, and from them to their assignees. As the junior mortgagee or his assignee could not redeem a single lot out of the several mortgaged, from the older mortgagee, neither can he redeem a single lot from one who is the assignee of the older mortgagee, because such assignee succeeds to all the rights of the older mortgagee. (*Dick* agt. *Livingston*, ante, 10.)
2. If a part of premises covered by a prior mortgage can be redeemed by a junior mortgagee, all the parties who purchased at the prior mortgage sale, or their grantees, and the prior mortgagees should be parties. In such case it is always a question what amount shall be paid, and the owner of every parcel covered by the prior mortgage and the plaintiff in the foreclosure suit should be before the court. (*Id.*)

See ATTORNEY AND CLIENT.

Crane agt. *Boane*, ante, 310.

MUNICIPAL CORPORATION.

1. A municipal corporation has no right, by the grading of streets

and the construction of sewers, to gather the surface water and sewage from a considerable territory, and through a sewer discharge them upon the premises of an individual. (*Van Rensselaer* agt. *City of Albany*, ante, 42.)

2. The casting upon the premises of such individual of the filth from such sewers is a nuisance, and the municipality is liable therefor and can be called upon to abate it. (*Id.*)
3. There can be no dedication of land while the owners are continually declaring a contrary intent, nor can a right to continue a nuisance be established by user because no user will legalize a nuisance. (*Id.*)

4. A municipal corporation, in addition to the powers specifically granted by its charter, has full power to act in reference to all matters in which it has an interest, except so far as restrained by constitutional limitations.

Accordingly, where an action *quo warranto* is brought by the people to test the title of a municipal officer, and the complaint is dismissed on the merits:

Held, that the expenses necessarily incurred by defendant in establishing his right to the office, are expenses necessarily incurred in the discharge of his duty, and that the city has full right and power to pay the same.

Also, *held*, that it is entirely immaterial what attorneys performed the services, assuming they were proper and necessary. (*McOredie* agt. *The City of Buffalo*, ante, 336.)

MUTUAL BENEFIT ASSOCIATION.

1. When the by-laws of a mutual benefit association provided that, "If any member shall neglect to pay his annual dues or assess-

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ments to the general secretary or to the secretary of the local board, *within thirty days from the date of a notice to pay the same by the general secretary, he shall forfeit all claims on the society, until reinstated, as provided in the next section.*"

Held, that the forfeiture is only incurred by the failure for "thirty days" to pay on a notice given "by the general secretary." (*Payn* agt. *The Mutual Relief Society of Rochester*, ante, 220.)

2. A notice given by the local secretary cannot be deemed one "by the general secretary;" nor are cards issued in the name of the general secretary, to which his signature is appended in print, and which the local secretary has filled up and addressed, in any sense a notice "by the general secretary." (*Id.*)
3. A notice to do an act, which is required to be given by a particular person named contemplates the personal action and judgment of the person authorized to give such notice, and involves the exercise of power and discretion to be exercised by the individual himself which he cannot delegate to another. (*Id.*)
4. Where on the death of a member application was made to the proper officer for the necessary blanks to furnish proof of death, which were refused on the ground that such member did not pay a certain assessment and the officer did not consider he was a member:
Held, that this was a waiver of proof and notice of death. (*Id.*)

NEGLIGENCE.

1. The pilot and the deck hand were not fellow-servants. (*Briggs* agt. *The Titan*, ante, 22.)
2. When a tow hides a light on a tug, the tug is liable. (*Id.*)

3. The "Hills" is liable also for excess in speed and for not having a look-out. (*Id.*)

4. Both parties being to blame, neither may claim to be excused by the others and the decree of the district court giving \$3,000 damages, one-half against the "Hills" and one-half against "The Titan" to the libellant, Briggs, is affirmed. (*Id.*)

5. An infant, if *sui juris*, after he sees the approach of a car in time to avoid it, cannot voluntarily assume the risk attending an effort to cross a railroad track and recover for an injury arising from the failure of his experiment. (*Motel* agt. *Sixth Avenue Railroad Company*, ante, 30.)

6. Plaintiff arriving at the passenger depot of the defendants' railroad, which has two modes of ingress and egress — one by Steuben street, which is on a level with the depot, the other by Maiden lane, which has a stone stairway maintained and kept by the defendant — took the stone stairway to Maiden lane, and while passing such stairway slipped and fell injuring himself, for which injury he brought an action against the railroad. At close of plaintiff's case, and also when the testimony was complete, defendant moved to nonsuit plaintiff on the grounds that negligence of defendants in removing snow and ice from the steps had not been shown, and that the absence of contributory negligence by plaintiff did not affirmatively appear, but, on the contrary, the undisputed evidence showed that he was guilty of contributory negligence. The motion was denied and both questions were submitted to the jury as questions of fact to be determined by them upon a motion for a new trial:

Held, first. That while the defendant showed by its employees that it had been diligent in re-

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moving all snow and ice, yet on the other hand, there was evidence on the part of the plaintiff that the snow and ice had been upon the steps for several days. What was the truth in that particular was a question of fact; and whether or not, if the jury believed the witnesses of the plaintiff rather than those of the defendant, the defendant has been guilty of negligence in failing to remove such snow and ice was also a question of fact. These were proper questions to be submitted to the jury.

Second. When a person who is walking on a dangerous and slippery place, persists in doing so without using, as he might readily and easily do, the safeguards there placed for his protection and support (*i. e.*) when, as in this case, the person injured knew he was walking upon slippery steps upon which he was liable to fall and knowing that he could protect himself by grasping a rail placed there for that purpose, yet proceeds with full knowledge of his peril and of his neglect of a means of safety; these conceded facts demonstrate that the person injured was clearly guilty of contributory negligence and should have been nonsuited. (*Foster* agt. *The New York Central and Hudson River Railroad Co.*, ante, 416.)

NEW TRIAL.

1. Upon an appeal from a judgment for \$158 recovered by the plaintiff, the general term ordered a new trial unless the plaintiff would stipulate to reduce the damages to sixty-one dollars and twenty-five cents. The plaintiff gave the stipulation, and the judgment as modified was affirmed. Thereupon the defendant, without delay, but after more than four years had elapsed from the time of the entry of the original judgment, moved for a new trial upon the ground of newly dis-

covered evidence: *Held*, that an order denying the motion should be affirmed, without examining as to whether or not the application was a meritorious one. (*Fisher* agt. *Corwin*, 85 Hun, 253.)

2. In an action of replevin brought in a justice's court the complaint alleged that the property was of the value of \$150, and the answer admitted it to be of the value of \$130. The justice rendered a judgment that the plaintiff retain the property and recover eight dollars and forty-eight cents costs, but he failed to fix the value of the property. Upon an appeal taken by the defendant to the county court: *Held*, that he was entitled to a new trial, under section 3068 of the Code of Civil Procedure; that in the absence of any finding by the justice as to the value of the property it might be determined by the pleadings. (*Reynolds* agt. *Swick*, 85 Hun, 278.)
3. A new trial will not be granted on account of newly discovered evidence if it is cumulative, nor unless it is clear that, if produced, it would change the result. (*Geneva, Ithaca and Sayre R. R. Co.* agt. *Sage*, 85 Hun, 95.)
4. Appeal from an order of a county court denying a new trial — when the county court may grant or refuse a new trial, in its discretion — its decision is not reviewable at general term. (*See Myers* agt. *Riley*, 86 Hun, 20.)

NEW YORK (CITY OF).

1. By the act of 1884, chapter 248, the teachers in the colored schools, when said act was passed, were continued as such teachers in the ward schools and primaries until removed in the manner provided by law. (*The People ex rel. Ray* agt. *Davenport*, ante, 17.)
2. The words "removed in the man-

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ner provided by law," mean the manner provided by the statutes relating to such removals. Those statutes provide for a removal by the board of trustees, and by the board of education, and a license of a teacher may also be revoked for any cause affecting the morality or competency of such teacher. (*Id.*)

3. The act of 1884 does not warrant the dropping of a teacher under a provision of a by-law of the board of education. The clear intention of the legislature was to continue the teachers in the colored schools until they were removed for some misconduct. (*Id.*)

4. To an action brought for a violation of a corporation ordinance, the defense set up a resolution, passed by the common council on September 18, 1884, providing that the corporation attorney, before the commencement of any action for the violation of any of the ordinances of the city, shall give notice in writing ten days before instituting suit, to every delinquent:

Held, that the common council had no power to pass such ordinance. (*The Mayor agt. Heustl, ante*, 149.)

NUISANCE.

See DEED.

Flanagan agt. Hollingsworth, ante, 391.

OFFER OF JUDGMENT.

1. Where defendants were sued as partners upon a partnership indebtedness, and one appeared and defended the action, the other defendant not being served with process and not appearing, the one appearing served an offer to allow judgment to be taken "*against him*" for sixty-five dollars and

fifty-four cents, with interest and costs. The plaintiff recovered a judgment against the defendants "*jointly*" for seventy-two dollars and ninety-one cents, but this included interest, so that the judgment "*in amount*," is not more favorable than the offer:

Held, that a joint judgment could not have been entered upon the offer, and, therefore, the recovery is more favorable, as it is enforceable against the joint property of both defendants, as well as the property of the defendants served, and the plaintiff is entitled to tax his costs. (*Bannerman agt. Quackenbush et al., ante*, 82.)

2. Upon a motion by an attaching creditor to set aside a judgment and execution, which judgment had been entered upon plaintiff's acceptance of an offer made by defendants, because the acceptance did not have annexed thereto any affidavit to the effect that the plaintiff's attorneys were duly authorized to accept said offer, as required by section 740 of the Code of Civil Procedure:

Held, that the court has power to allow an amendment *nunc pro tunc*, annexing the proper affidavit; and where it appears that the omissions to annex the proper affidavit to the acceptance was an inadvertence of the attorney, and that the authority to accept actually existed, the amendment should be granted. (*Stark agt. Stark and another, ante*, 360.)

OFFICE AND OFFICER.

1. A person who takes proceedings, under the Revised Statutes, to compel the delivery by another to him of the books and papers of an office, should at least show a *prima facie* title to the office, and this would be properly proved by the official canvass showing claimant to have received the greatest number of votes. (*Matter of Case agt. Campbell, ante*, 85.)

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2. Such proceedings to compel the delivery of books, &c., are not to be used to try the title to an office; and when the result of an election is declared by the official canvassers, a county judge has no power, upon such an application, to take evidence and determine the result of an election. (*Id.*)

3. It is only in a clear case, or in one free from reasonable doubt, that the authority conferred upon the court by the Revised Statutes to compel the delivery of books and papers in the possession of one officer to the custody of another will be exercised. The remedy is only given where the case is so clear that the conduct of the party, in refusing to deliver, could be called *willful* or *obstinate*, and not in a case in which a person in *good faith* holds possession of an office supposing himself to be the lawful incumbent, and with that possession the custody of books and papers essential to the proper discharge of its duties. (*Bridgman* agt. *Hall*, ante, 173.)

4. Do the provisions of the Revised statutes under which this proceeding is instituted apply to the office — chamberlain or treasurer of a municipal corporation created by special charter — which each of the parties to this proceeding claim to be entitled to. *Quare.* (*Id.*)

OFFSET.

1. Where a broker has possession of goods to be sold, and sells them in his own name, he is a factor, and any offset existing against the latter may be set up to a claim made by the true owner of the property to recover the contract-price, provided the vendee purchased in good faith and without notice of the true facts. (*Bannerman* agt. *Quackenbush et al.*, ante, 293.)

PARTIES.

1. If a part of the premises covered by a prior mortgage can be redeemed by a junior mortgagee, all the parties who purchased at the prior mortgage sale, or their grantees, and the prior mortgagees should be parties. In such a case it is always a question what amount shall be paid, and the owner of every parcel covered by the prior mortgage and the plaintiff in the foreclosure suit should be before the court. (*Dick* agt. *Livingston*, ante, 10.)

See ACTION.

Farnum agt. *Barnum*, ante, 396.

2. One patron of a cheese factory may sue alone to recover damages occasioned to him by the negligence of its salesman. (*See Souls* agt. *Mogg*, 35 *Hun*, 79.)

3. Survival of action for slander brought by partners — when the action does not abate by reason of the death of one of the partners. (*See Shale* agt. *Schante*, 35 *Hun*, 622.)

4. An action against persons as executors cannot be changed to one against them as individuals (*See Van Cott* agt. *Prentice*, 35 *Hun*, 817.)

5. Corporation — right of one obtaining a transfer of its stock, for the purpose of suing it, to maintain the suit. (*See Ervin* agt. *Oregon Ry. and Nav. Co.*, 35 *Hun*, 544.)

6. Failure to appoint a guardian for an infant plaintiff does not deprive the court of jurisdiction of the action. (*See Sims* agt. *N. Y. College of Dentistry*, 35 *Hun*, 344.)

7. Order of substitution — Code of Civil Procedure, sec. 757 — an assignee may be substituted as plaintiff although a counter-claim has been pleaded. (*See Schlichter* agt. *S. Brooklyn Saw Mill Co.*, 35 *Hun*, 339.)

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8. Five persons conveyed to two trustees their rights and interests in certain inventions or improvements, in order to enable the trustees to dispose of them to the best advantage. The proceeds arising upon any sale were to be divided among the parties, in proportion to the value of their respective inventions, and in case of dispute the proportion was to be settled by arbitration. (*Bear* agt. *Am. Rapid Telegraph Co.*, 36 *Hun*, 400.)
 9. This action was brought by the plaintiff, one of the parties to the agreement, to have the trustees removed for neglect of duty and breach of faith in returning to a corporation, which had purchased the said inventions, the certificates of its stock which it had agreed to give in payment therefor: *Held*, that the action could not be maintained without making all the parties to the agreement parties to the action. (*Id.*)
 10. That the fact that the complaint alleged that the action was brought by the plaintiff not only in his own behalf, but also in behalf of his co-beneficiaries in the trust, did not cure the omission. (*Id.*)
 11. That although the defect of parties appeared upon the face of the complaint, the right to object was not, in this case, waived by the failure of the defendants to raise the objection by demurrer. (*Id.*)
 12. When a failure to make a proper party a defendant is waived by a failure to raise the objection by demurrer. (*See Strauss* agt. *Tradesmen's Nat. Bank*, 36 *Hun*, 451.)
 13. Examination of a person having property belonging to the estate of a deceased person—all the executors or administrators should be parties to the proceeding—Code of Civil Procedure, sec. 2706. (*See Matter of Slingerland*, 36 *Hun*, 575.)
 14. To an action to enforce the liability created by section 23 of chapter 611 of 1875, all the directors of the corporation who are liable must be made parties. (*See McClave* agt. *Thompson*, 36 *Hun*, 365.)
 15. Action for the judicial construction of a will—when it should not be brought by a legatee, devisee or *cestui que trust*—when the guardian of an infant should not be joined as a plaintiff in such action. (*See Wood* agt. *Cantwell*, 36 *Hun*, 528.)
- ### PARTNERSHIP.
1. Business partnerships between husband and wife are not authorized. (*Jacquin* agt. *Jacquin*, ante, 51.)
 2. Therefore a husband cannot claim under a business copartnership with his wife, the right to a dissolution of the same and the appointment of a receiver. (*Id.*)
 3. This is adverse to *Zimmerman* agt. *Erhart and Dodge* (59 *How.*, 11), and *Graff et al.* agt. *Kinney* (1 *How. [N. S.]*, 59); see, also, *Fairles* agt. *Bloomingtondale* (67 *How.*, 292). (*Id.*)
- ### PENAL CODE.
1. Section 94—The provisions of the Code of Criminal Procedure relating to indictments should be construed with the common-law principles of pleading, and where no provision is made by the Code the common-law rule should prevail.
The Code has not changed the common-law rule that an indictment must show on its face a criminal offense
Under the general election laws the return of the results of an elec-

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tion to be given to or filed with the supervisor of the town or ward in which the election was held, must be the original return and not a mere certified copy.

Accordingly, where it appeared on the face of an indictment that a copy of a return was given to and filed with the supervisor of a ward, and that it was mutilated by him, no offense is shown under this section of the Penal Code, as it was not filed or deposited with him "by authority of law." (*The People* agt. *Wise*, ante, 92.)

2. Section 282 — It is not necessary, to constitute the crime of abduction, as defined by subdivision 1 of this section of the Penal Code, that the accused should in any case use any force or practice any fraud or deception, and it is sufficient within the statute if the female is induced by his request, advice or persuasion, to go from the place where the accused met and approached such female with the request and solicitation for her to accompany him, or meet him at some other place indicated by the accused, with the intent and purpose there to accomplish the act of her defilement.

The offense may be accomplished without an actual manual capture of the female, nor is it necessary that she should be taken against her will, nor is it necessary that the girl should be taken from her parents or other custodian of her person (*The People* agt. *Seeley*, ante, 105.)

3. Section 649 — This section of the Penal Code covers only cases of a messenger appointed by authority of law, or any person who interferes with such messenger. (*The People* agt. *Wiss*, ante, 92.)

PLACE OF TRIAL.

1. Under the provisions of the act of 1875 (secs. 1, 2, 3, chap. 465, *Laws of 1875*), as amended (chap.

359, *Laws of 1876*; chap. 153, *Laws of 1879*), imposing a penalty upon the agent of a foreign insurance company who effects or procures an insurance against fire upon property within the limits of a city or incorporated village without having first given a bond to the treasurer of the fire department of the municipality, conditioned for the payment to such treasurer of a percentage on premiums received the cause of action so given arises in the municipality; it is immaterial where the contract of insurance was actually signed. (*Ithaca F. Dept.* agt. *Beecher*, 99 *N. Y.*, 429.)

2. Under the provision, therefore, of the Code of Civil Procedure (sec. 983), requiring that an action to recover a statutory penalty shall be in the county "where the cause of action, or some part thereof, arose," an action to recover such a penalty is triable in the county wherein the city or village is located. (*Id.*)

PLEADING.

1. A verification of a pleading made by the secretary of a domestic corporation in the usual form, as required by the Code, when a pleading is verified by the party, is a sufficient verification. (*American Insulator Co.* agt. *Bankers and Merchants' Telegraph Co.*, ante, 120.)
2. It is only agents or attorneys that are required, when verifying pleadings, to set forth the grounds of their belief as to all matters not stated upon their knowledge, and the reason why the verification is not made by the party. A corporation cannot take an oath, and the statute points out the way in which it must verify a pleading. Such verification is the verification of the corporation and a verification by the party. (*Id.*)
3. Although the failure of a plain-

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tiff to pray for the precise relief to which he is entitled is not a ground for demurrer, yet the character and nature of the relief demanded may properly be considered by the court, when passing upon a demurrer interposed to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. (*Swart agt. Doughton*, 35 *Hun*, 281.)

4. Where all of the allegations of the complaint are made for the purpose of procuring equitable relief, and that relief alone is asked for, the complaint cannot be sustained as a complaint in an action for legal redress, where no legal redress is asked for and where no answer has been served. (*Id.*)

5. The complaint in this action after stating, among other things, that the plaintiff was one of the children of one Schermerhorn, who had died intestate, seized in fee of a certain piece of real estate, alleged that the county treasurer of Monroe county executed, under his hand and official seal, as treasurer of the county, for the people of the state of New York, a deed or conveyance of the said premises to the supervisors of that county, and that the supervisors of that county subsequently conveyed the same to one of the defendants; that these deeds were recorded in the office of the clerk of the said county, and that the defendant was in possession of the premises thereunder; that the deed to the supervisors is by an act of the legislature made presumptive evidence of the regularity of the proceedings; that the proceedings are regular upon their face, and that the defects claimed by the plaintiff to exist can only be made to appear by extrinsic evidence and will not necessarily appear in any proceedings at law by the said defendant to defend or en-

force his rights under the conveyance. (*Id.*)

6. The complaint then alleged in general terms that the assessment, levy and sale were illegal and void, and that the acts required by the charter to be done prior to the assessment and conveyance had not been done, and that the deeds above mentioned were a cloud upon the title of the plaintiff and the other heirs-at-law of said Schermerhorn, and asked that such deeds be adjudged inoperative and void and generally for other relief: *Held*, that as the complaint itself showed a *prima facie* title in the defendant, and as no specific facts establishing the invalidity of this title were alleged, but mere conclusions of law, the complaint did not state facts sufficient to constitute a cause of action and that a demurrer thereto should be sustained. (*Id.*)

7. The summons in this action was served upon the defendant in the state of Virginia. An answer, verified by himself, was served by R. L. Harrison, who subscribed it as "attorney for defendant." The first defense in the answer alleged that the defendant was not at the time of the commencement of the action or the service of the answer a resident of the state of New York, and that he had no property therein, and had not been served with a summons therein: *Held*, that as the facts showing that the court had no jurisdiction over the defendant did not appear from the face of the complaint the defendant properly set them up in his answer, and that the service of such answer so subscribed by his attorney could not be regarded as a general appearance rendering him amenable to the jurisdiction of the court. (*Hamburger agt. Baker*, 35 *Hun*, 455.)

8. The answer contained other

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separate defenses to the action: *Held*, that the old rule preventing a defendant from joining a plea in abatement with one in bar was no longer in force, and that the addition of the other defenses to the first did not prevent the defendant from insisting upon the latter. (*Id*)

9. In this action, brought by the plaintiff, a charitable corporation, to recover damages for a libel alleged to have been published by the defendants, the complaint alleged, among other things, that by reason of the publication persons, who otherwise would have done so, had ceased and refused to contribute or make donations to it. Two of these persons were named in the complaint, and others were referred to as John Doe and Richard Roe and others whose names were unknown to the plaintiff: *Held*, that it was proper for the court to grant an order requiring the plaintiff to furnish a bill of particulars stating the names of the persons who, by reason of the matters alleged in the complaint, had ceased or refused to make contributions to or for the benefit of the plaintiff. (*N. Y. Infant Asylum* *agt. Roosevelt*, 35 *Hun*, 501.)

10. The complaint in this action alleged, among other things, that on the 26th day of September, 1883, the plaintiff was the owner and entitled to the immediate possession of certain leaf tobacco; that on that day the defendant wrongfully took, carried away and sold the same. The present defendants, the indemnitors of the sheriff, the original defendant, having been, upon their own application, substituted as defendants in his place, served an answer containing a general denial and an allegation that at the time named Klinger Brothers were the owners of the tobacco. Upon the trial the plaintiff proved that she had purchased the prop-

erty at a sale upon executions issued upon judgments recovered by herself and a daughter against Klinger Brothers, and that thereafter the sheriff seized and sold the property under attachments issued against Klinger Brothers. The defendants offered to prove that the judgments under which the plaintiff claimed were fraudulent, and entered for the purpose of defrauding the creditors of Klinger Brothers, and also that the levy and sale upon the executions were irregular: *Held*, that the court properly excluded the evidence as inadmissible under the answer. (*Klinger* *agt. Bondy*, 36 *Hun*, 601.)

11. That as Klinger Brothers made no objection, the plaintiff's title was good as against all the world, except as against such creditors of Klinger Brothers as were especially injured by the sale, who, if they desired to avail themselves of their rights, must allege the facts they desired to prove in their answer, as they could not prove them under a general denial. That as the plaintiff's proof showed that she had both the title to and the possession of the tobacco, the defendants could not defend by proving title in Klinger Brothers, nor could they raise any objection which Klinger Brothers could waive, without alleging and proving facts which gave them the right to stand in Klinger Brothers' shoes and assail the plaintiff's title. (*Id.*)

12. The complaint in this action alleged that the plaintiff was the wife of one Amos Ford; that the defendant, at the time therein mentioned, kept a place in Ogdensburg at which intoxicating liquors were sold; that on August twentieth, while the defendant was in possession of said premises, the plaintiff's husband became intoxicated; "that said intoxication was caused in whole or in part by intoxicating liquors

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- sold or given away by the said Ames, his agents or servants, at and upon said place;" that while so intoxicated, and in consequence thereof, her husband was drowned, and by reason thereof the plaintiff was injured in her property and means of support, for which latter she was wholly dependent upon said Amos Ford: *Held*, that the complaint sufficiently alleged a sale or giving away of intoxicating liquors by the defendant to the husband to justify the court in overruling a demurrer interposed to the complaint upon the ground that the facts stated therein did not constitute a cause of action. (*Ford* agt. *Ames*, 36 *Hun*, 571.)
18. In this action, brought by the plaintiff's intestate to recover a life estate in land, which she alleged she had been induced, by the defendants' fraud, to convey to them, no demand for damages for the detention thereof was made in the complaint. After her death her administrator, alleging that the action had been pending for several years, during which time a large amount of rents and profits had accrued, procured an order reviving the action in his name and allowing him to serve a supplemental complaint, in which he sought to recover the damages resulting from such detention: *Held*, that the order was a proper one and should be affirmed. (*De Lisle* agt. *Hunt*, 36 *Hun*, 630.)
14. Motion to make a complaint more definite and to state causes of action separately—within what time it must be made—Code of Civil Procedure, sec. 516—General Rule No 22—when the right to make such a motion is waived, by procuring an extension of the time to answer or demur. (*See Brooks* agt. *Hanchett*, 36 *Hun*, 70.)
15. No reply is necessary when a claim, on the part of a defendant, is set up simply as a defense and not as a counter-claim—when the General Term has no right to compel the respondent to consent to a reduction of the amount of his judgment. (*See Cockerill* agt. *Loonam*, 36 *Hun*, 353.)
16. A demurrer to an entire pleading, overruled if either of several causes of action herein is well pleaded. (*See Haight* agt. *Bristin*, 36 *Hun*, 579.)
17. Pleadings in a criminal case—how affected by the Code of Criminal Procedure, secs. 273, 275, 323—form of indictment. (*See People* agt. *Menken*, 36 *Hun*, 90.)
18. Former adjudication—when a bar—when a joint demurrer to a defense good as against two of three plaintiffs will not be sustained. (*See Menzley* agt. *City of Binghamton*, 36 *Hun*, 171.)
19. It is not essential that the complaint in an action for negligence shall allege absence of contributory negligence on the part of plaintiff; such an allegation is substantially involved in the averment that the injury complained of was occasioned by defendant's negligence. (*See* agt. *Troy C. G. L. Co.*, 98 *N. Y.*, 151.)
20. A party is under no obligation to state in his pleading the theory of law upon which his claim is based; he is required only to state the facts, and if sufficient to constitute a cause of action or defense, the pleading is not demurrable because the legal effect of the facts is not stated, or even because the proper form of relief is not demanded. (*Hemmingway* agt. *Poucher*, 98 *N. Y.*, 281.)
21. It is not necessary for defendant in an action to recover damages for negligence causing death, to allege that the wrong was committed in another state; it is for the plaintiff to allege and prove that the cause of action arose

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within the jurisdiction. (*Debovoise agt. N. Y., L. E. and W. R. R. Co., 98 N. Y., 377.*)

23. The practice of referring in an answer to parts of the complaint which the pleader intends to admit or deny, as "at" or "between" certain folios, does not conform to the spirit of the provision of the Code of Civil Procedure (*sec. 22*), which requires pleadings to be made out "in words at length and not abbreviated," and serves no useful purpose on appeal where original folios do not appear in the case. (*Caulkins agt. Bolton, 98 N. Y., 511.*)

PRACTICE.

1. On February 14, 1884, the National Bank of Port Jervis, as plaintiffs, by its attorneys, recovered a judgment against J. C. H. and J. H., as defendants. The recovery was upon a promissory note of which J. C. was maker and J. accommodation indorser. An execution was issued to the sheriff of Sullivan county, and on April 14, 1874, J. H. paid full amount to attorneys of plaintiff, who then withdrew the execution. The payment was not to extinguish the judgment, but it was to be kept in life and to be assigned to wife of said J. H. On January 24, 1883, such assignment was made to C. S. H., wife of J. H. The judgment-roll was filed in clerk's office of Orange county. A transcript was filed in office of clerk of Ulster county July 11, 1883, and judgment thereon entered in such county, the residence of J. C., and on same day execution issued to sheriff of such county, which was returned unsatisfied to Orange county clerk's office July 18, 1883. The execution was subscribed "A. N. C., Atty. for Pltff.," and stated in body thereof the assignment to C. S. H. on January 24, 1883. The direction to sheriff was to collect

execution and judgment out of property of defendant J. C. H. Such execution did not issue at request of plaintiff in the judgment, nor was any leave to issue obtained or granted by order of this court. Several orders for examination of J. C. H. in supplemental proceedings have been obtained by assignee of judgment and are pending before county judge of Ulster county. On return day of first order J. C. H. appeared and claimed that he had paid the judgment in full to J. H., producing receipt, dated December 11, 1880, purporting to be signed and executed by said J. H. J. C. moved at special term to vacate the order for examination, and to set aside the execution and return upon the ground that the judgment had been paid to J. and was extinguished by said receipt. Such motion being resisted by J. H. and wife it was referred to a referee, who found that J. H. did not make nor execute such receipt, and that no payment had been made to J. H. or his wife. The report was confirmed by special term and motion to set aside execution and return with supplemental proceedings based thereon was denied, and \$179.02 costs, &c., upon such motion was directed to be paid by said J. C. H. to J. H. On appeal to general term the order of special term was affirmed, with ten dollars costs. The order of general term was granted upon default of J. C., who by order of special term was permitted to move at general term to open such default on payment of ten dollars costs. Of such order J. has not availed himself. The costs of the previous motions of special and general term, have not been paid. (*The National Bank of Port Jervis agt. Hansee, ante, 200.*)

2. On motion by J. C. H. to set aside the execution and return and the various orders in supplemental proceedings, upon the grounds

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that leave of the court to issue such execution was not obtained, and that the payment by J. to the attorneys of the plaintiff extinguished the judgment, and he avers that when he made the previous motion he was not aware of the existence of the grounds upon which he now moves: *Held*, first, that the prior motion is a bar upon the principle of *res adjudicata*. It is a bar not because the points now made were made, but because they might and should have been made. The moving party, had he used ordinary diligence, could have ascertained the facts upon which he now moves, and this want of diligence would defeat a motion for leave to renew.

Second. The costs imposed upon the first motion made in this matter by the party now moving remaining unpaid, the court is powerless to entertain the present motion, as by the non-payment of such costs all proceedings on the part of the party required to pay them are stayed.

Third. As the orders of the special term and general term adjudging the judgment unpaid are unreversed the motion has no equity to sustain it.

Fourth. The payment of J. H. to the attorneys of the plaintiff did not extinguish the judgment. J. H. was the surety and J. C. H. the principal debtor. Payment by the former did not extinguish the debt, and he could have taken an assignment to himself and enforced it for his own benefit. (*Id.*)

3. Where a judgment by default is opened on condition that the lien of the judgment shall stand as security, the plaintiff, if he finally succeeds, must enter a new judgment by filing a fresh roll containing all the papers in the case, the same as if no former roll had been filed. The order opening the default in legal effect modifies the judgment by depriving it of its

ordinary character as a *res adjudicata*, but leaves it in full force as a lien or collateral security. If the plaintiff fails in the action the security is returned by canceling the collateral judgment, which loses its legal vitality and effect when the action fails. But if the plaintiff succeeds the security judgment is not impaired, but may be enforced, if necessary, by the plaintiff in aid of the final judgment. (*Negley* agt. *The Counting Room Company*, ante, 237.)

4. In case of appeal the trial or final judgment is the one to be appealed from, and no reference need be made to the security judgment. (*Id.*)
5. The court of appeals will entertain a motion to dismiss an appeal for which there is no foundation, without waiting until the case is reached in its regular order on the calendar. (*Stoughton* agt. *Lewis*, ante, 331.)
6. A plaintiff is not precluded from making a motion to dismiss an appeal taken by a defendant, because he (the plaintiff) has noticed the case for argument and placed it upon the calendar. He waives nothing by so doing. It is still optional with him to wait until the case is reached on the calendar, or to make his motion to dismiss on the ground that the appeal is unauthorized. (*Id.*)
7. Where, in an action to foreclose a mortgage, a complaint containing all the requisite allegations has been served upon defendant, who afterwards obtained a stipulation from plaintiff's attorney for further time to answer, agreeing not to put in any answer and not to ask any further extension of time. On the last day defendant served a demurrer which was, on motion, overruled and stricken out, and plaintiff proceeded as if no demurrer or answer had been interposed and obtained his judg-

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ment by default. The defendant appealed to the general term, where it was affirmed, and from the affirmance defendant appeals to this court:

Held, that, the demurrer having been overruled, the judgment went by default in the same manner as if no demurrer had been served, and no appeal is allowed from a judgment entered by default: The order overruling the demurrer not having been appealed from cannot be assailed on an appeal merely from the judgment. (*Id.*)

8. In a proceeding for removal of an assignee who has misconducted himself, where there are three assignors, one of whom has left the state, notice to one assignor is properly notice to all; though the better course would be to give the statutory five days' notice to the two within the state, in the ordinary way and to serve the absent assignor by depositing a notice in the post-office, addressed to him at his last known place of residence giving double the time. (*Matter of Cohen & Co.*, ante, 523.)

See ACTION.

Furnam agt. *Barnum*, ante, 396.

9. Trial of a specific question by a jury in an equitable action—when an order granting or refusing a new trial in, is appealable—Code of Civil Procedure, sec. 1847, sub. 2; sec. 1008. (*See Bowen* agt. *Becht*, 35 *Hun*, 484.)
10. In justices' court—when the plaintiff cannot recover without proving his claim—1881, chap. 414—Code of Civil Procedure, sec. 2891. (*See Oulman* agt. *Schmidt*, 35 *Hun*, 345.)
11. Agreement that an attorney shall share in the recovery—right of the attorney to proceed after a settlement between the parties without first obtaining leave of

the court. (*See Forstman* agt. *Shulting*, 35 *Hun*, 504.)

12. Referee's report—when set aside because of bias and prejudice upon the part of the referee—what will excuse delay in making the motion. (*See Burrows* agt. *Dickinson*, 35 *Hun*, 492.)
13. A motion for a new trial, after the entry of an interlocutory judgment, may be made at general term without taking any appeal from the judgment. (*See Moore* agt. *Oviatt*, 35 *Hun*, 216.)
14. A final judgment cannot be entered until all the issues are disposed of—the remedy of a party aggrieved by the irregular entry of a judgment is by motion at special term and not by appeal. (*See Robinson* agt. *Hall*, 35 *Hun*, 214.)
15. Libel—where there is no ambiguity, the construction of it is for the court. (*See Kingsbury* agt. *Bradstreet Co.*, 35 *Hun*, 212.)
16. Receivers of a corporation—in what district the application for the appointment must be made—1883, chap. 878—to what receivers it applies. (*See U. S. Trust Co.* agt. *N. Y., W. S. and B. R. Co.*, 35 *Hun*, 341.)
17. Judicial sale—defective service upon an infant—when a judgment entered upon it may be made binding upon the infant by a subsequent judgment—when a purchaser will be compelled to accept a doubtful title. (*See Rice* agt. *Barrett*, 35 *Hun*, 866.)
18. Costs—power of the court to compel the payment of, on the settlement of an action for a separation. (*See Smith* agt. *Smith*, 35 *Hun*, 378.)
19. When one foreign corporation can sue another in this state—Code of Civil Procedure, sec.

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1780. (*See Duquesne Club agt. Penn Bank of Pittsburg, 35 Hun, 890.*)
20. Foreign corporation—right of a non-resident to sue it in this state—Code of Civil Procedure, sec. 1780. (*See Adams agt. Penn Bank of Pittsburg, 35 Hun, 893.*)
21. No new note of issue need be filed after a supplemental complaint has been served—an order of the court should be reduced to writing. (*See Lovatt agt. Watson, 35 Hun, 553.*)
22. Constitution—right of one accused of crime to be confronted with witnesses—meaning of the requirement—United States Constitution, art. 6, and art. 14, sec. 1—bill of rights, sec. 14—Code of Criminal Procedure, sec. 8, sub. 3. (*See People agt. Williams, 35 Hun, 516*.)
23. Power of the court to enter a judgment in conformity with the equitable rights of defendants as between each other. (*See Johnson agt. Stone, 35 Hun, 380.*)
24. Service of summons by publication—when the order directing it may be subsequently amended—service of a summons upon an absent resident in an action of foreclosure—Code of Civil Procedure, sec. 433, sub. 5—right of the court to resettle findings after judgment. (*See Coffin agt. Lester, 36 Hun, 347.*)
25. Service of summons by publication—what facts show that personal service of the summons cannot be made. (*See Chase agt. Lawson, 36 Hun, 221.*)
26. Service of a summons on a defendant outside of the territorial jurisdiction of the court—effect of a judgment entered thereon in another state—when binding if the defendant appears—U. S. Const., art. 4, sec. 1. (*See Jones agt. Jones, 36 Hun, 414.*)
27. Surrogate—power to open decrees—Code of Civil Procedure, sec. 2481, sub. 6—intermediate accounting by a guardian or trustee—no decree can be entered by the surrogate. (*See Matter of Hawley, 36 Hun, 258.*)
28. Decree of surrogate on final accounting—when it will not be open to correct an error. (*See Matter of Deyo, 36 Hun, 512.*)
29. When a court of equity will set aside a decree entered in a surrogate's court. (*See Douglass agt. Low, 36 Hun, 497.*)
30. Proceedings to review erroneous assessments—1880, chap. 209—the earning capacity of real estate is a test of its value—review of a decision of the special term on appeal—how objections to the reception of evidence should be stated—erroneous admission of evidence—when the decision will not be reversed therefor. (*See People ex rel. Railroad agt. Keator, 36 Hun, 592.*)
31. Motion to make a complaint more definite and to state causes of action separately—within what time it must be made—Code of Civil Procedure, sec. 546—General Rule No. 23—when the right to make such a motion is waived, by procuring an extension of the time to answer or demur. (*See Brooks agt. Hunchett, 36 Hun, 70.*)
32. Appearance—how it must be made—Code of Civil Procedure, sec. 421. (*See Valentine agt. Myers' Sanitary Depot, 36 Hun, 201.*)
33. Judgment creditor's action—when maintainable after the judgment has ceased to be a lien upon real estate—Code of Civil Procedure, sec. 1871. (*See Scottie agt. Shed, 36 Hun, 165.*)

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34. Supplementary proceedings may be instituted before the recorder of the city of Oswego—1857, chap 96, sec. 4. (*See Ross agt. Wigg, 36 Hun, 107.*)
35. Additional allowance—where a motion therefor must be made. (*See Benn agt. Am. Rapid Telegraph Co., 36 Hun, 400.*)
36. Order for the examination of a corporate party before trial—a defaulting defendant may be examined—Code of Civil Procedure, sec. 873. (*See N. Y., L. E. and W. R. R. Co. agt. Carhart, 36 Hun, 288.*)
37. Examination of a person having property belonging to the estate of a deceased person—all the executors or administrators should be parties to the proceeding—Code of Civil Procedure, sec. 2706—an order denying a motion to dismiss the proceeding is appealable. (*See Matter of Singerland, 36 Hun, 575.*)
38. Action for the judicial construction of a will—when it should not be brought by a legatee, devisee or cestui que trust—when the guardian of an infant should not join as a plaintiff in such action—costs of an action brought by the guardian and the infant cestui que trust—direction for their payment. (*See Wead agt. Cantwell, 36 Hun, 528.*)
39. Action against a lodge of free and accepted masons—how brought. (*See Cohn agt. Borst, 36 Hun, 562.*)
40. What evidence is inadmissible under a general denial—facts authorizing the defendants to attack the plaintiff's title as fraudulent, must be pleaded. (*See Klinger agt. Bondy, 36 Hun, 601.*)
41. Application for an order requiring an attorney to pay over money to his client—not granted during the pendency of an action by the client to recover the same money. (*See Matter of Mott, 36 Hun, 569.*)
42. Justices' court—amount involved—when an action does not involve the accounts of the parties, within section 2863 of the Code of Civil Procedure. (*See Brisbane agt. Bank of Batavia, 36 Hun, 17.*)
43. Leave to file a supplemental complaint—when granted—revivor of action. (*See De Lisle agt. Hunt, 36 Hun, 620.*)
44. Examination of delinquent taxpayers—what facts must be stated in the affidavit—1867, chap. 361, sec. 1, as amended by chap. 640 of 1881. (*See Matter of Conklin, 36 Hun, 588.*)
45. Former adjudication—when a bar—when a joint demurrer to a defense good as against two of three plaintiffs will not be sustained. (*See Meagley agt. City of Binghamton, 36 Hun, 171.*)
46. Mechanics' liens in New York city—both chapter 379 of 1875, and chapter 486 of 1880 are in force there. (*See Cockerill agt. Loonam, 36 Hun, 853.*)
47. An action must be brought by the real party in interest—Code of Civil Procedure, sec. 449—in enforcing claims in this state a foreign creditor must follow the *lex fori*. (*See Merchants' Loan and Trust Co. agt. Clair, 36 Hun, 862.*)
48. Commissioners to appraise lands to be taken for a railroad—appeal from their report—insolvency of railroad—demand for payment of the award, necessary—when the report will be set aside because a son of one of the commissioners is taken into the employ of the company before the hearing. (*See N. Y., W. S. and B. R. Co. agt. Townsend, 36 Hun, 630.*)
49. Execution—the death of the

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plaintiff after its issue does not suspend its operation — errors in the form of a constable's bond — when the sureties cannot avail themselves of them as a defense — when the justice may adjourn a cause on consent of the attorneys for the parties. (*See Jones agt. Newman, 86 Hun, 634.*)

50. When errors of fact are not reviewable on appeal — when the case should be ordered to be annexed to the judgment-roll — right of the court to further instruct the jury in the absence of counsel — evidence of actual value admissible as bearing on the probable truth of conflicting claims as to an agreed price. (*See Cornish agt. Graff, 86 Hun, 160.*)

51. Costs — when a party does not waive his right to appeal from an order, by accepting costs thereby awarded to him. (*See Matter of Water Commissioners of Amsterdam, 86 Hun, 534.*)

52. Sureties on an executor's bond — when an action lies against them before any order or claim against the executor has been made in the surrogate's court — Code of Civil Procedure, sec. 2607. (*See Haight agt. Brisbin, 86 Hun, 579.*)

53. Peremptory challenge — when the right must be exercised — the time for the exercise of the right cannot be limited by the court — Code of Criminal Procedure, secs. 369, 371. (*See People agt. Carpenter, 86 Hun, 815.*)

54. Jurors in a criminal action — when not disqualified by reason of having formed an opinion — Code of Criminal Procedure, sec. 376 — right to renew on appeal challenges to jurors — Code of Criminal Procedure, sec. 455, sub. 2; 1873, chap. 427 — the burden of proof rests upon the people — a reasonable doubt as to any element of the crime entitles the

prisoner to an acquittal. (*See People agt. Willett, 86 Hun, 500.*)

PROCESS.

1. An order for the service of a summons by publication, in an action to foreclose a mortgage, was made upon the affidavit of one Wood, who stated that he learned from one Tibbs, at Wappinger's Falls, Dutchess county, that two of the defendants resided in Philadelphia, Pennsylvania, and three others at Danbury, Connecticut, the said Tibbs being a brother-in-law of one of the said defendants. The plaintiff's attorney also made an affidavit, stating that he was informed and believed that the said defendants were non-residents of this state, but resided at the places above-mentioned; and further stated "the sources of deponent's information is the affidavit annexed hereto made by George Wood, who was employed by deponent to ascertain the residences of said parties; that said defendants cannot, after due diligence, be found within this state, and that deponent is informed and believes that said defendants are now at the places above stated." Held, that the affidavits sufficiently showed that the plaintiff had been and would be unable, with due diligence, to make personal service of the summons on these defendants, and conferred jurisdiction upon the justice to make the order. (*Chase agt. Lawson, 86 Hun, 221.*)
2. Where an order directing the service of a summons by publication, although in fact made by a justice at chambers, has a caption as though made at a special term, the court has power to subsequently amend the order by striking out the caption. (*Coffin agt. Lester, 86 Hun, 847.*)
3. In an action to foreclose a mort

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gage an order for the service of the summons upon a resident defendant, who is absent from the state, might, in March, 1878, have been made under subdivision 5 of section 498 of the Code of Civil Procedure, without showing, before such an order could be made, the facts required to be shown by subdivisions 2, 3 or 4 of the said section. (*Id.*)

4. The authority to so serve the summons upon a resident in such an action does not violate the provisions of the constitution. (*Id.*)

5. In an action to foreclose a mortgage an order directing the summons to be served by publication on certain of the defendants was made upon an affidavit of one of the plaintiff's attorneys, which stated, among other things, that since the commencement of the action he had made, and caused to be made, inquiries as to the residences of the defendants; that three of them, whose names he gave, were each non-residents of the state of New York, and that each of them resided at Ballebag, county Monaghan, Ireland; that he was informed and believed that the summons could not, after due diligence, be served on said defendants, or either of them, and that it was necessary to serve the summons on them by due publication thereof. (*Wunnenberg* agt. *Gearly*, 36 Hun, 243.)

6. The affidavit of one Burke was also presented, which stated that he had been directed to serve the summons on all the defendants; that he had served a number of them, but had been unable, with due diligence, to serve those named in the affidavit of the plaintiff's attorney, and that the said defendants were non-residents of the state of New York and resided in Ireland: *Held*, that the fact that the plaintiff had been and would be unable, with due diligence, to

make personal service of the summons upon those defendants, was sufficiently established to authorize the granting of an order directing its service by publication. (*Id.*)

7. Service of a summons on a defendant outside of the territorial jurisdiction of the court — effect of a judgment entered thereon in another state — when binding if the defendant appears — United States Constitution, art 4, sec. 1. (*See Jones* agt. *Jones*, 36 Hun, 414.)

PUBLIC ADMINISTRATOR.

1. It is by sections 2706-2714 of the Code of Civil Procedure, and not by section 222 of chapter 410 of the laws of 1882, that the procedure is now regulated by which the public administrator can cause inquiry to be instituted into the alleged withholding or concealment of property belonging to an intestate's estate, whereof such public administrator is in charge by virtue of letters issued to him by the surrogate. (*In the Estate of Ellis H. Elias, deceased, ante*, 158.)

RAILROADS.

1. Where commissioners were appointed under chapter 253 of the Laws of 1884, by the general term of the supreme court on the application of a railroad company to determine on the use of certain streets, and they reported against the application and in favor of the property owners:

Held, that as the report was adverse to the company there was no necessity for its confirmation by the court. (*Matter of the Nassau Cable Co., ante*, 124.)

2. It is made a condition precedent to a right to construct such railroad for the company to either obtain the consent of the property owners or a favorable report of

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the commissioners, confirmed by the court. There is no occasion for action by the court, except to confirm a favorable report or to refuse confirmation. (*Id.*)

3. The court has power to determine whether the commissioners have performed their duties under the statute, and should it appear that they had refused to hear the parties or take any evidence, or the report was such as to plainly show fraud or irregularity, the report may be sent back. But an erroneous ruling in excluding testimony, or, in admitting immaterial, or even incompetent or hearsay evidence is not sufficient to warrant sending a case back for future hearing. (*Id.*)

4. A railroad company, being desirous of acquiring for railroad purposes certain land owned by B., entered into a written agreement with B. by which she agreed, upon the payment of the full purchase-price, to convey to said company the premises. With a view of ascertaining the value of said premises and the compensation which should be paid therefor the railroad company agreed to institute proceedings under the general railroad laws for the condemnation of lands for railroad purposes; and it was further provided in said agreement that in said proceedings H. D. and C. should be appointed commissioners to ascertain and determine the compensation to be paid, and the decision of a majority of them should be binding upon both parties, it being also agreed that said commissioners should be governed in estimating the said valuation by the rules of law applicable to proceedings under said statute (except as they may be modified by this agreement), and that all the rights of appeal given by law shall be reserved to either party. An order was obtained by the railroad company at special term appointing said persons commis-

sioners. They entered upon their duties, and after viewing the premises and hearing proofs made a report. The railroad company not being satisfied with the report and award refused to move for confirmation, and the owner moved and obtained an order at special term confirming the report and appraisal. On appeal by the railroad company the appraisal and report were set aside by the general term on the ground of the admission by the commissioners of improper evidence. The hearing again came on before the commissioners, who, notwithstanding the objection of the railroad company, received the same objectionable evidence, the receipt of which on the first hearing was the cause of the reversal of their report, and two of the commissioners, "D." and "C." publicly stated that they did not consider themselves bound by the supreme court decision. After the hearing had proceeded so far that the owner had introduced her evidence, the railroad company not having introduced its evidence, moved to vacate the order appointing the commissioners:

Held, first, that commissioners "D." and "C." have been guilty of misconduct, such as is cause for their removal.

Second. That the court on this motion has power to remove them.

Third. That this is a proper case to exercise such power notwithstanding the contract existing between the parties. (*Matter of the New York, Lackawanna and Western Railway Co.*, ante, 225)

5. Where, upon an application to the general term for the appointment of commissioners to determine whether a proposed railroad should be constructed through certain streets in New York city, it appears that such railroad cannot legally be built by reason of the refusal of other railroad companies already lawfully occupying

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the streets with their tracks to consent to its construction, such application should be denied (DAVIS, P. J., *dissenting*). (*Matter of the Thirty-fourth Street Railroad Co.*, *ante*, 369.)

6. Although in determining the value of railroad or canal property, for the purposes of taxation, the cost of creating it may be considered, yet its earning capacity should be the more controlling consideration or test. (*People ex rel. Pres., etc., D. and H. Canal Co. agt. Roosa and others*, *ante*, 454.)

7. The assessors in estimating the value of railroad or canal property, within a town, are not to be governed solely by its cost, but rather, though not exclusively, by its productiveness for railroad or canal purposes. (*People ex rel. Pres., etc., D. and H. Canal Co. agt. Keator*, *ante*, 479.)

8. The taxable value of the part of a canal which lies within a town in which the tax is laid, is to be ascertained by valuing, as a part of a whole a continuous way to carry freight from one point to another, and the profits of its use for that purpose (*See ante*, 454). (*Id.*)

RECEIVER.

1. Corporations attacked by the state for insolvency can, even after a receiver is appointed, use their corporate funds for their own protection in the litigation if their action is taken in good faith and with a reasonable hope of success in the controversy. (*Matter of the Attorney General agt. Atlantic Mutual Life Ins. Co.*, *ante*, 146.)

See ASSIGNMENT.

Nelson agt. Tenney, *ante*, 272.

2. In an action brought by a receiver, appointed in supplement-

ary proceedings, to set aside as fraudulent a conveyance of real estate, executed by the judgment debtor, so as to subject the property to levy and sale on execution, where the receiver simply proves his appointment, without showing the proceedings necessary to vest in him title to the real estate, he is not entitled to recover the rents and profits. (*Wright agt. Nosstrand*, 98 N. Y., 639.)

3. A court having power to, and which appoints a receiver of the assets of an insolvent corporation, may, in aid of that appointment, forbid any after interference, by way of levy and seizure by attachment or execution, with the property in his possession. (*Woerishoffer agt. N. R. Con. Co.*, 99 N. Y., 398.)

REFEREE.

1. The sixty days in which a referee must make his report do not commence to run until the cause is submitted. (*Morrison agt. Lawrence*, *ante*, 72.)

2. Where briefs are to be submitted there is no submission of the cause until the time to hand in the briefs is passed. (*Id.*)

3. The referee has power to enlarge the time for the submission of briefs. (*Id.*)

4. Having his report ready and tendering it on payment of his fees, within the sixty days, is sufficient. (*See to same effect decision by general term, first department. Little agt. Lynch*, 1 How. [N. S.], 95). (*Id.*)

5. In an action for divorce on the ground of alleged cruelty, brought by a wife against her husband, even where the wife prevails, the defendant, the husband, will be compelled to take up the report and pay the referee's fees. (*Early agt. Early*, *ante*, 239.)

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6. While courts should be careful to see that no improper relations exist between a referee and one of the parties to an action, and that nothing occurs during the progress of the trial which shall in anywise tend to produce a favorable impression in behalf of one of the parties to the reference, yet such scrutiny should not be carried to the extreme length of holding that because a referee sustains friendly relations to the kin of one of the parties, relations so close as to lead to his employment as his legal adviser, and the legal adviser of his estate, that such relations would bias his judgment in the action in which he had been appointed referee. (*Durant agt. O'Brien, ante, 813.*)
7. When the referee had heard the proofs, and made his report finding in favor of the plaintiff, and from the judgment perfected upon such report defendant had appealed to the general term, which general term had affirmed the judgment, and the defendant had appealed to the court of appeals, and while such appeal was still pending defendant made a motion to set aside the report of the referee upon the ground that such referee was biased in favor of the plaintiff:
Held, that the motion resting solely and only upon the ground that the referee was the friend and legal adviser of the nephew of the plaintiff such fact of itself would not warrant the inference of bias and partiality, and especially when it appeared that this was known to the counsel of the party moving before the trial of the action was commenced. (*Id.*)
2. No application was made for the appointment of a special guardian for such infant and none was appointed, but all the parties who appeared, consented to the entry of an order directing the stenographer of the surrogate's court to take testimony as a referee. The trial proceeded before such referee, and, at its conclusion the evidence was submitted to the surrogate, who decided that the probate should be revoked. The entry of a decree upon that decision being opposed by the respondents, and it being contended that the order of reference was without authority and that all proceedings subsequent thereto were void:
Held, that the order of reference and the proceedings thereunder should not be vacated upon the motion of any party who had consented to its entry and to the submission of its results to the surrogate for his determination.
Held, also, that a special guardian should be appointed to represent the infant, and to ascertain and report whether it would be for the best interests of the infant that the proceedings should stand as theretofore conducted, and a decree be entered accordingly, or that the trial should be commenced *de novo*. (*Id.*)
3. That in view of section 3355 of the Code, sections 90 and 2511 must be construed as if they had simultaneously become law, and that so construed, "a clerk or other person employed in the surrogate's office" is competent to act as referee, in a proceeding pending in the surrogate's court, provided he is appointed with the written consent of all the parties appearing. (*Id.*)
4. That the stenographer of the surrogate's court is not within the scope of section 90 or of section 2511. (*Id.*)

REFERENCE.

1. In a proceeding for the revocation of probate all necessary parties, including the infant son of the decedent, were duly served with citation. (*In the Estate of Tunis Cooper, deceased, ante, 38.*)

See Costs.

Overheiser agt. Moorehouse, ante, 257

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5. This was an application to set aside the report of a referee upon the ground that he had become biased or improperly influenced against the defendant before the final decision of the action. It appeared that the referee, from time to time as the trial proceeded, importuned the defendant to aid him in securing an appointment to an office from the governor, and believed that the defendant could by earnestly exerting himself secure it for him; that these importunities continued to be addressed or suggested after the submission of the case and until near the time of its decision; and there was reasonable cause to believe that the prejudice was occasioned by the failure of the defendant to answer the last letter from the referee, which was written shortly before the case was decided: *Held*, that the report should be set aside. (*Burrows* agt. *Dickinson*, 85 Hun 492.)
6. The report was made on May 11, 1880. The motion to set aside the report was made in February, 1884. It was shown by the affidavits that the defendant had intended to appeal from the judgment, and was therefore compelled to have a case made and settled by the referee; that both the defendant and his counsel deemed it injudicious and dangerous to institute proceedings to set aside the report until the case had been settled, and that this application was made as soon as it could be after such settlement had been made: *Held*, that these facts furnished a sufficient excuse for the delay. (*Id.*)
7. It is within the power and discretion of a referee, on trial of an action, to allow an amendment of the complaint, which does not affect the issue upon determination of which plaintiff's right to relief depends, or which does not bring in a new cause of action; and his decision thereon is not reviewable here. (*Price* agt. *Brown*, 98 N. Y., 388.)
8. Where, upon trial before a referee, questions as to the admissibility of evidence objected to are without dissent reserved, and the referee is not thereafter asked to pass upon them, and no exceptions are taken, and no application made to strike out the testimony, no question is presented of which an appellate court can take notice. (*In re Yates*, 99 N. Y., 94.)
9. To prevent the termination of a reference by notice, as prescribed by the Code of Civil Procedure (sec. 1019), the report must be actually delivered to the attorney of one of the parties, or filed with the clerk "within sixty days from the time the cause was finally submitted." (*Little* agt. *Lynch*, 99 N. Y., 112.)
10. An offer by a referee to deliver his report to the successful party, on payment of his fees, within the time limited, is not equivalent to a delivery. (*Id.*)
11. Under the provision of the general assignment act (sec. 21, chap. 466, Laws of 1877), authorizing the county judge, on petition of a party interested, to order the examination of witnesses and the production of books and papers before him or a referee, the examination only can be committed to a referee, who is to take and file the testimony; the judge has no authority to direct the referee to report his opinion on the evidence, or to examine such witnesses or compel the production of such books and papers as the petitioner may require; the judge himself must in his order name the witnesses and the books and papers. The propriety of any examination sought is to be determined by the judge and may not be delegated to a referee. (*In re Holbrook*, 99 N. Y., 539.)

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REMOVAL OF CAUSE.

1. Where the petition for removal of a cause from the state court to the United States court is made by a plaintiff who claims that he is a resident of New Jersey and that the defendant is a resident of New York, before or at the time of filing such petition, the petitioner must make and file in the state court an affidavit that he has reason to believe, and does believe, that from prejudice or local influence, he will not be able to obtain justice in such state court. (*Hatcher et al. agt. Rankin, ante, 459.*)
2. Where a petitioner fails to comply with this requirement he cannot accomplish the removal of the action. (*Id.*)
3. Where the petition and bond have been "accepted, allowed and approved" by a justice of the state court, such acceptance, allowance and approval imply that said justice was satisfied, and decided that the amount in dispute did exceed the sum of \$500; and if such decision can be reviewed at all in the state court, the application, if made to a judge other than the one who made such decision, must be on notice of motion to set aside such acceptance, allowance and approval as having been improvidently made. (*Id.*)

REPLEVIN.

1. Where a sheriff has attached goods under process against one Toledo, and the plaintiff claims title through the same person, it is entirely irrelevant who owns the goods if Toledo does not. (*Siedenbach agt. Riley, ante, 143.*)
2. A denial of plaintiff's title alone is not a good defense. (*Id.*)
3. If the bill of sale to plaintiff was *bona fide* and was followed by pos-

session, plaintiff is entitled to recover. (*Id.*)

4. These are questions for the jury. (*Id.*)
5. A failure to give possession only raises a presumption of fraud which may be rebutted by proof that the transaction was fair. (*Id.*)
6. No need of a demand if the complaint averred an unlawful detention. (*Id.*)
7. To entitle a party to maintain a replevin he must have had title to the property or the possession of it, or at least the right of possession. (*Pakas agt. Rucy, ante, 377.*)
8. Where the plaintiff's claim to the right of possession is founded upon an agreement alleged to have been made with the defendant, who is an infant, such alleged agreement being that if the horse, &c., was awarded to her she would give it to the plaintiff:
Held, that such agreement, if it had been made, was voidable, and the horse having been awarded to be delivered to her, the plaintiff, under such an agreement, had no right to the possession of it. (*Id.*)
9. In the replevin suit the verdict of the jury should fix the value of the property at the time of the trial, as required by the statute. This omission cannot be supplied by the court by inserting in the judgment a sum of money as the value of the property. (*Id.*)

REPLY.

1. A plaintiff is not entitled to serve a reply to an answer where it is apparent that the whole object and scope of the defense to which it is sought to reply is to show that some party other than the plaintiff should have brought the action. The remedy, in such case, would seem to be a motion to strike out.

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(*Ward* agt. *Comegys et al.*, ante, 429.)

SECURITY FOR COSTS

1. A person who brings an action in the name of the overseer of the poor under chapter 628 of the Laws of 1857, as amended by chapter 820 of the Laws of 1873, to recover penalties for a violation of the excise law cannot be required to file security for costs under section 8271 of the Code of Civil Procedure. (*Matter of Martin*, ante, 26.)
2. Section 3271 does not apply (*Sharp* agt. *Funcher*, 29 *Hun*, 193, criticized and not followed; *Board of Commissioners of Excise* agt. *McGrath*, 27 *Hun*, 425, followed). (*Id.*)
3. A deposit as security for costs must be regarded, for all the purposes of the action, as the property of the person making the deposit. But where the action results favorably to the plaintiff, and the litigation is terminated, the deposit is not liable to seizure on other judgments if the money, in fact, belongs to other persons who made the deposit subject only to the contingency stated. (*Frazer* agt. *Ward*, ante, 47.)
4. In an action in the city court of New York, a plaintiff residing without the state, but having an office in the city of New York, where he regularly transacts business in person, cannot be required to give security for costs. (*Wyckoff* agt. *Devlin*, ante, 38.)
5. Sections 3268 and 3160, Code of Civil Procedure, construed. (*Id.*)

SET-OFF.

1. The taxable costs in an action are not subject to set-off. (*Turno* agt. *Parks et al.*, ante, 35.)

2. An attorney has a lien for his services in a particular case, as a mechanic would upon the product of his labor, and equity intervenes to save it for him, but this lien would ordinarily be measured by his taxable costs, but might embrace a further fee, and will not always be limited to such costs if a special contract had been made in good faith between the client and his attorney, but, *it seems*, it must refer to his services in the particular action. (*Id.*)

3. Where prior to the recovery of the judgment the plaintiff assigned to his attorney herein all his interest in the cause of action in payment for services in the suit of *Parks* agt. *Turno*, and also for money loaned, and the attorney held this assignment prior to the recovery of judgment, and due notice was given the defendants

Held, that the equity of the attorney is superior to that of the plaintiff, and no right of set-off exists. (*Id.*)

4. Lease — a holding over operates to renew it with all its terms and covenants — when damages for breach of a lessor's covenant may be set up in an action by him for rent. (*See Elwood* agt. *Forkell*, 35 *Hun*, 202.)

5. Sale by an agent without disclosing his principal—right of the vendee to treat the agent as principal—how far he may set off against the purchase-price claims against the agent subsequently purchased. (*See Nichols* agt. *Martin*, 35 *Hun*, 168.)

SHERIFF.

1. The act (chapter 270, *Laws of 1884*), is not sufficient to authorize the board of estimate and apportionment to fix the fees, percentages and allowances of the present sheriff, during his term of office, at the rates set forth in their reso-

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- lution of December 29, 1884, for services thereafter to be rendered. (*Davidson* agt. *The Mayor, &c., of New York*, ante, 182.)
2. The act construed as not authorizing any interference with the fees of the then incumbent of the sheriff's office, but the fixing of compensation authorized deemed to apply to his successors in office. (*Id.*)
 3. The provision of section 709 of the Code of Civil Procedure permitting the sheriff to hold property taken under an attachment after the warrant of attachment has been vacated on the application of defendant, until his costs and expenses have been paid, and sell it for their payment, is unconstitutional, as being in effect to allow him to hold and dispose of the property of one party to pay the debt exclusively of another (*See Hall* agt. *United States Reflector Company*, 66 How., 51). (*Bowes* agt. *The United States Reflector Company and others*, ante, 440.)
 4. In an action upon a bond of indemnity to the sheriff, it was error to refuse to charge the jury that if neither the sheriff nor any of his deputies judged the property taken under the execution in reference to which the indemnity applied was owned by the judgment debtor, then the defendant was entitled to averdict. (*O'Donohue et al.* agt. *Simmons*, ante, 461.)
 5. Although an execution is regular on its face, if it be, in fact, unauthorized and void the sheriff may refuse to execute it; and proof of its invalidity establishes a good defense to an action against him for such refusal. (*Reid* agt. *Stegman*, 99 N. Y., 646.)
 2. To maintain slander of title, it must be alleged to have been malicious. (*Id.*)
 3. It is no slander to allege ownership and that plaintiff has no title. (*Id.*)
 4. Under section 484 of the Code of Civil Procedure, trespass and slander of title cannot be joined in the same complaint. (*Id.*)

SPECIAL PROCEEDINGS.

1. When the material allegations in the moving affidavit or verified petition in a special proceeding are not denied by some counter affidavit, they stand sufficiently proved for the purposes of the ultimate order. (*In re N. Y., L. & W. R. R. Co.*, 99 N. Y., 12.)
2. In proceedings by a railroad corporation to acquire title to lands, the petition averred the due incorporation of the petitioner. A counter affidavit denied any knowledge or information sufficient to form a belief as to the truth of said averment: *Held*, that considering this simply as an affidavit, it was not a denial of the averment; that treating it as an answer there was no such denial as put the petitioner to proof of its incorporation, as under the Code of Civil Procedure (sec. 1776) a corporation plaintiff is not required to prove its corporate existence unless the answer contains an affirmative allegation that plaintiff is not a corporation; that, therefore, conceding the land-owner might, without a former denial, disprove the fact, the burden was upon it of proving the petitioner was not a corporation. (*Id.*)

SLANDER OF TITLE.

1. The courts of this state have no jurisdiction for trespass to lands without the state. (*Dodge* agt. *Colby*, ante, 475.)

SPECIFIC PERFORMANCE.

1. A purchaser cannot justify his refusal to perform his contract by a mere factious objection to the

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title tendered him, nor is it sufficient for him when the jurisdiction of an equity court is invoked to compel him to perform his contract merely to raise a doubt as to the vendor's title. (*Johnson and another agt. Duncan, ante, 386.*)

2. Before he can successfully resist performance of his contract on the ground of defect of title, there must be at least a reasonable doubt as to the vendor's title, such as affects its value, and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. (*Id.*)
3. Inexcusable laches and delays will debar a party from the relief which, they being absent, he might have by the judgment for specific performance. (*Id.*)
4. Time, though not ordinarily of the essence of the contract, may become so, if by its effluxion a change of value or other material change of circumstances has been produced, but if the delay of the defendants is unreasonable and inexcusable, it is enough to relieve the unwilling party from the contract. (*Id.*)
5. *It seems*, that a party to a contract for the purchase of land has no equitable lien for the amount paid on the execution of the contract where he has lost the right to enforce such contract by his own laches. (*Id.*)

STATUTE OF LIMITATIONS.

1. Before the adoption of the Code of Civil Procedure, the statute of limitations of a foreign state constituted no defense to an action brought here, but section 390 of the Code of Civil Procedure has changed the rule to some extent. (*Howe agt. Welch, ante, 507.*)
2. In this case the cause of action does not come within the excep-

tions of section 390, for the reasons: *First.* The cause of action did not originally accrue in favor of a resident of this state, but in favor of a resident of the state of Ohio. *Second.* Because before the expiration of the period of limitation the person in whose favor the cause of action originally accrued did not become a resident of the state of New York as he lived and died in Ohio; and because, *Third.* The cause of action was not assigned before the expiration of the time so limited to a resident of this state. (*Id.*)

3. Where it is sought to revive a debt barred by the statute of limitations by a new promise to pay "when able" the burden is on the plaintiff to prove ability to pay. Failure to establish the conditions upon which the new promise was made is a failure to revive a debt barred by the statute of limitations. (*Id.*)

See JUDGMENT.

Spencer agt. Wait, ante, 117.

STOCK.

1. Stock purchased on margin by a stock-broker for a customer, becomes the property of the customer, as between them the relation of pledgor and pledgee is created and exists, and upon payment of the amount due the customer becomes entitled to the possession of the stock. (*Matter of Smyth, ante, 481.*)

STOCK EXCHANGE.

1. Under the rules of the New York Stock Exchange, when a member assigns, all securities held by other members of the exchange for indebtedness to them of the member failing, may be sold at once and without notice, and all members have a lien upon the

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seat in said exchange of any member indebted to them for the amount of the indebtedness. (*Matter of Smyth, ante, 431.*)

2. S., of Albany, N. Y., a stock-broker and member of the New York Exchange, assigned His New York correspondents were H. B. & Co. He bought all stock and bonds for his customers through them. They held bonds belonging to the customers of S., and also stock bought on margin. H. B. & Co. knew no one in their transactions but S. H. B. & Co., immediately after the failure of S., sold the stock and bonds of the customers of S. and applied the proceeds on their claim against S., and the assignee afterwards selling the seat, paid H. B. & Co., the balance due them, retaining the remainder thereof: *Held*, that the owners of the stock and bonds so sold, had a claim superior to the general creditors of S., and were entitled to have their several interests allowed out of the moneys in the hands of the assignee, arising from the sale of the seat in said exchange. (*Id.*)

STREET IMPROVEMENTS.

1. When a law for repaving a street has been duly passed, proposals to do the work invited, bids received, and by resolution of the contracting board of a city the contract let to the lowest bidder, the proposer has a right to have the proper contract written out in accordance with his bid so accepted, and the board has no right to rescind the resolution awarding the contract. A *mandamus* will issue to compel the execution of the proper contract by the city. (*People ex rel. Hoiler agt. Board of Contract, &c., of the City of Albany, ante, 423.*)
2. Lot owners may petition a common council for a street improvement by attorney, and this although the phrase "or their

duly authorized attorneys," is omitted in the section under which petition is made, although the phrase is to be found in the preceding section. The want of power of the attorney to sign is not presumed, but must be proved by those who attack the petition. (*Id.*)

3. Under chapter 252 of the Laws of 1885, the governor of the state may sign any petition required by law to be made for the improvement of streets in cities whenever the land owned by the state fronts on the street to be improved. It is immaterial that the state does not appear on the tax-rolls of the city. (*Id.*)
4. The legislature has power to make the certificate of the city surveyor and engineer of a city conclusive evidence that the required number of feet are duly represented on a petition for a street improvement. (*Id.*)

SUMMARY PROCEEDINGS.

1. The court may restrain, by injunction, summary proceedings, if the justice goes beyond his jurisdiction, either in taking cognizance of the proceedings or while he is acting in it, and if it appears that the justice who granted the warrant, the enforcement of which is sought to be restrained, was without jurisdiction, the injunction should be continued. (*Kiernan agt. Reming, ante, 89.*)
2. A justice has no power in summary proceedings to adjourn the same except for the purpose of enabling a party to procure his necessary witnesses. (*Id.*)
3. Where, upon the return of the precept, the tenant filed a verified traverse of the return and moved to dismiss the proceedings, and the justice, after hearing the testimony of the parties as to the

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service of the precept instead of rendering his decision upon the close of the evidence, adjourned the proceedings for the purpose of decision:

Held, to operate as a discontinuance of the proceedings. (*Id.*)

4. A justice, other than the one before the precept is returnable, has no jurisdiction to issue the warrant. (*Id.*)
5. In examinations in supplementary proceedings in the city court, where it appears that the judgment debtor has made a general assignment for the benefit of his creditors, the examination need not be limited to property acquired since the assignment. (*Schneider et al. agt. Altman, ante, 448.*)

SUMMONS.

1. Where there was furnished to the judge who made the order for the service of a summons by publication a verified complaint showing a sufficient cause of action against the defendants to be served, and positive proof by affidavit that they resided in Ireland, and that the attorneys for the plaintiff delivered copies of the summonses to B. with directions to serve them; proof by the affidavit of one of the attorneys for plaintiff that he was informed and believes that the summons could not, after due diligence, be served on the defendants, supplemented by the affidavit of B., who was charged with the duty of making the service; that he had served the summons on a number of the defendants, but that he had been unable, with due diligence, to make personal service on the three defendants named, and he also proved their non-residence:

Held, that the statutory requirements of the Code of Civil Procedure have been complied with, and that the affidavits are suffi-

cient. (*Wunnenberg agt. Gerarty, ante, 181.*)

2. The statutes do not require extreme diligence or extraordinary exertion. They only require proper and suitable diligence, such as the circumstances of the case require. (*Id.*)
3. Where, in an action of foreclosure, unknown owners are made defendants, as authorized by the Code of Civil Procedure (*secs. 438, 451*), and are described in the summons, the addition of the words "if any," does not invalidate the process. (*Abbott agt. Curran, 98 N. Y., 665.*)

SUPPLEMENTARY PROCEEDINGS.

1. It is not necessary to state in the affidavit to obtain order for examination of a judgment debtor, in proceedings supplementary to execution, that the city court of New York is a court of record, that no previous application for an order to examine judgment debtor has been made in the action or that the judgment was rendered upon the judgment debtor's appearance or personal service of the summons upon him. (*Sayer agt. McDonald, ante, 119.*)
2. The title to the personal property of a judgment debtor, residing in another county than that in which the judgment-roll in the action is filed, is not vested in a receiver in supplementary proceedings until the order appointing him has been filed in the office of the clerk of the county where the judgment-roll is filed, and a copy of the order, certified by that clerk, is filed with the clerk of the county where the judgment debtor resides. (*Staats agt. Wemple, ante, 161.*)
3. And until then the receiver is not

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entitled to an order requiring the judgment debtor to deliver his personal property to him. (*Id.*)

4. Where orders were granted for the examination of a judgment debtor on proceedings supplementary to execution, upon affidavits in the usual form made by one of the attorneys who recovered the judgments for the plaintiff. On motion by the judgment debtor to vacate such orders upon the ground that prior to the granting of the orders the title to the judgments had passed to a receiver:

Held, that the judgment debtor had the right to make such motion.

Held, further, that an attorney must obtain leave of the court before he can institute supplementary proceedings upon a judgment in favor of his own client after the title to that judgment has passed from the client to the receiver, and especially where the proceedings are instituted by an affidavit that says nothing about the lien of the attorney. (*Moore* agt. *Taylor and another*, ante, 343.)

5. An order in supplementary proceedings directed the judgment debtor to deliver to the sheriff a sum of money, which had been paid to him as wages after the institution of the supplementary proceedings. The defendant was a resident of Pennsylvania, and it appeared that the money was in that state: *Held*, that the order was erroneous; that the court had no power to compel the debtor to go out of this state to obtain the money and bring it here. (*Buchanan* agt. *Hunt*, 98 N. Y., 560.)

6. *It seems* the most the court had power to do was to require the debtor to transfer his title to the money to a receiver. (*Id.*)

7. In an action brought by a receiver, appointed in supplementary proceedings, to set aside as fraudulent a conveyance of real

estate, executed by the judgment debtor, so as to subject the property to levy and sale on execution, where the receiver simply proves his appointment, without showing the proceedings necessary to vest in him title to the real estate, he is not entitled to recover the rents and profits. (*Wright* agt. *Nostrand*, 98 N. Y., 669.)

SURETIES.

1. The sureties on the official bond of a city marshal are not liable until after a valid judgment has been recovered against their principal. (*In re Mary Brasier*, ante, 154.)
2. In an action upon a bond of indemnity to the sheriff, it was error to refuse to charge the jury that if neither the sheriff nor any of his deputies judged the property taken under the execution in reference to which the indemnity applied was owned by the judgment debtor, then the defendant was entitled to a verdict. (*O'Donohue* agt. *Simmons*, ante, 461.)

SURROGATES.

1. The provisions contained in section 18 of article 6 of the constitution, to the effect that "no person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age," does not apply to persons holding the office of surrogate. (*The People ex rel. Lent* agt. *Carr*, ante, 501.)

SURROGATE'S COURT.

1. Where a claim against an estate is presented, in proper form and duly verified, to the person and at the place named in the statutory notice to creditors given by ex-

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- ecutors, and after a reasonable opportunity to examine into its validity and fairness, the executors do not offer to refer on the ground that they doubt its justice, or do not dispute it, it acquires the character of a liquidated and undisputed debt against the estate. (*Lambert agt. Craft*, 98 N. Y., 342.)
2. Although where application is made by the creditor, by petition to the surrogate to direct payment of such a claim, it is in the power of the executors under the provisions of the Code of Civil Procedure (*secs.* 2717, 2718) to divest the surrogate of jurisdiction and put the claimant to his proof in another court; if they fail to do this, it is only necessary for the surrogate to be satisfied by proof, that there is personal property of the estate applicable to the payment or satisfaction of the claim, and which may be applied without injuriously affecting the rights of others (*sec.* 2718, *sub.* 2). (*Id.*)
 3. An oral plea of a general denial in answer to the petition is ineffectual for any purpose. (*Id.*)
 4. *It seems* that in any case as the jurisdiction of the surrogate to direct payment of a debt is confined to undisputed claims, the petitioner is neither required to state the facts which go to make out his debt, nor if stated, will he be permitted to establish them. The presentation of the petition, and the citation issued thereon (*sec.* 2516), brings in the executor, not to plead or respond to the petition, but by a verified written answer to set forth affirmative facts, if any exist which show "that it is doubtful whether the petitioner's claim is valid and legal," and also "denying its validity or legality absolutely or upon information and belief." The answer must meet both requirements to require a dismissal of the petition. (*Id.*)
 5. A surrogate, on settlement of the accounts of an executor or administrator, who has made advances for the support and maintenance of a minor entitled to a share in the estate, has jurisdiction to determine, upon equitable principles, a claim for such advances; and an allowance is proper where the expenditure for which reimbursement is so sought is such as would have been authorized by the court had application been made in advance. (*Hyland agt. Baxter*, 98 N. Y., 610.)
 6. Where, therefore, in an action by an administrator to have advances made by him for the support of the testator's minor children, applied in deduction of the sums adjudged against him on settlement of his accounts by the surrogate on account of the distributive shares of said minors, it appeared that in the account presented by the administrator before the surrogate the advances were set out and a credit claimed for the amount thereof, but the claim was disallowed: *Held*, that the decision of the surrogate thereon was *res adjudicata*; and so, conclusive upon the parties in this action. (*Id.*)

TAXES AND ASSESSMENTS.

1. The assessors, in estimating the value of railroad or canal property within a town, are not to be governed solely by its cost, but rather, though not exclusively, by its productiveness for railroad or canal purposes. (*People ex rel., President, &c., of D. & H. Canal Co. agt. Keator*, ante, 479.)
2. The taxable value of the part of a canal which lies within a town in which the tax is laid, is to be ascertained by valuing, as a part of a whole a continuous way to carry freight from one point to another, and the profits of its use

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for that purpose (*See ante*, 454). (*Id.*)

TRADE-MARK.

1. A person who has been a hired workman of another, a mere employe for a time, afterwards engaging in the same business of his former employer and occupying a store in the same city, has no right to use the name of such former employer upon his cards, signs, &c., by saying "late with," &c., and such use will be restrained by injunction. (*Van Wyck agt. Horowitz, ante*, 279.)

TRIAL.

1. Subdivision 2 of section 1847 of the Code of Civil Procedure provides that appeals may be taken to the general term of the supreme court from an order granting or refusing a new trial, "except that where specific questions of fact, arising upon the issues in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose as prescribed in section 971 of this act, an appeal cannot be taken from an order granting or refusing a new trial upon the merits." Held, that the prohibition against appealing from an order "upon the merits" was intended to limit and restrict the consideration of the effect of the evidence to the jury and to the court before which an application to set aside the verdict and for a new trial, might be made under the provisions of section 1003 of the said Code. (*Bowen agt. Becht*, 35 Hun, 484.)
2. That it was not designed to extend beyond a review of the effect of the evidence bearing upon the issue tried. (*Id.*)
3. That the exception was not intended to prevent the review, by appeal, of rulings made by the

justice presiding at the trial before the jury, by which proper evidence was rejected, or improper evidence received, or unsound rules applied to the consideration of the evidence in the submission of the case to the jury. (*Id.*)

4. That where such erroneous rulings have been made, and the verdict in part influenced by them has been made the basis of the final recovery, a new trial should be ordered, despite the provisions of section 1003 of the said Code, declaring that "an error in the admission or exclusion of evidence, or in any other ruling or direction of the judge upon the trial, may, in the discretion of the court which reviews it, be disregarded if that court is of opinion that substantial justice does not require that a new trial should be granted." (*Id.*)
5. Where such erroneous rulings have been made by the justice presiding at the trial before the jury of the specific questions referred to them, and it appears from the decision of the justice before whom the issues in the action were tried at special term, and from the judgment entered thereon, that the findings of the jury upon the questions submitted to them were considered by him in arriving at his decision, the judgment will be reversed. (*Id.*)
6. To the complaint in this action, which contained five separate causes of action, the defendant demurred, upon the grounds that there was an improper joinder of causes of action, that the second cause of action therein stated did not state facts sufficient to constitute a cause of action, and that the third cause of action did not state facts sufficient to constitute a cause of action. Upon the hearing of the issues raised by the demurrer it was decided that the second cause of action as set

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forth in the complaint did not state facts sufficient to constitute a cause of action. The defendant thereupon entered a judgment dismissing the complaint as to the second cause of action and for costs. Upon an appeal taken by the plaintiff from this judgment: *Held*, that as the issues of law raised by the first and third grounds of demurrer had not been decided, no final judgment could be entered. (*Robinson* agt. *Hall*, 35 *Hun*, 214.)

7. That the remedy of the plaintiff was not by appeal, but by a motion at special term to have the judgment so irregularly entered vacated and the remaining issues properly disposed of. (*Id.*)
8. That the appeal should be dismissed. (*Id.*)
9. The rule which is to be applied where a contradiction exists between the findings of fact and conclusions of law appearing in the decision, signed by the judge or referee, and the findings made upon special requests therefore submitted by either of the parties, considered, and the old rule that in such cases the special findings is to control, criticised and doubted. (*Sisson* agt. *Cummings*, 35 *Hun*, 22.)
10. The proper manner of preparing the findings of fact and conclusions of law which are to be signed by the judge or referee and filed as his decision, stated. (*Id.*)
11. Referee's report—when set aside because of bias and prejudice upon the part of the referee—what will excuse delay in making the motion (*See Burrows* agt. *Dickinson*, 35 *Hun*, 493.)
12. By the court—findings of fact and conclusions of law must be made and signed—a trial of a contested question of fact by the

court cannot be reviewed unless such a decision be made. (*See Benjamin* agt. *Allen*, 35 *Hun*, 115.)

13. Trial for murder in the first degree—when the question of premeditation and deliberation must be left to the jury—errors in the charge—when not cured by a subsequent modification thereof—defense of an *alibi*—it is error to charge that it is a suspicious defense—what evidence may be admitted to sustain the defense. (*See People* agt. *Kelly*, 35 *Hun*, 295.)

TRUST.

1. The courts recognize a difference between the intent of a testator to create a legal direction on his devisee and the intent solely to create a moral obligation; the latter does not create a trust. (*Bowker and others* agt. *Wells and others*, ante, 150.)
2. While a secret trust to apply devised property to an illegal purpose will render the devisee a trustee for the heirs-at-law or next of kin, the trust must be established in such a manner that if legal it would be binding upon the trustee. (*Id.*)
3. D. by her will gave the bulk of her estate to four persons, or such of them as might survive her and be of sound mind, absolutely, as joint tenants and not as tenants in common (expressing a wish although stating that it was not to be taken as a legal direction), the estate so bequeathed and devised should be applied by these four gentlemen as they might deem wise to the promotion in the United States of sound political knowledge. In an action to construe the will:
Held, that the language of the will, if directed toward a purpose capable of legal enforcement, would not have created a trust, and as there is no promise shown

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de hors the will to apply the devised property to such purpose, the devise is valid and the devisees take the property absolutely as their own (*O'Hara* agt. *Dudley*, 95 *N. Y.*, 408, *distinguished*). (*Id.*)

See WILL.

Ward agt. *Ward and others*, ante 845.

TRUSTEES.**See CORPORATION.**

United States Ice and Refrigerator Co., agt. *Reed et al.*, ante 258.

VERIFICATION.

1. A verification of a pleading made by the secretary of a domestic corporation in the usual form, as required by the Code, when a pleading is verified by the party, is a sufficient verification. (*American Insulator Co.* agt. *Bankers' and Merchants' Telegraph Co.*, ante, 120.)
2. It is only agents or attorneys that are required, when verifying pleadings, to set forth the grounds of their belief as to all matters not stated upon their knowledge, and the reason why the verification is not made by the party. A corporation cannot take an oath, and the statute points out the way in which it must verify a pleading. Such verification is the verification of the corporation and a verification by the party. (*Id.*)

WILL.

1. The primary fund for payment of legacies is personal estate and realty, cannot be charged with the burden unless by express direction or clear intent drawn from the will, aided by outside circumstances, if any there be. (*Reyher* agt. *Reyher and others*, ante, 74.)

2. The will of R., after directing the payment of his debts, directed his executors to pay to his father, mother, brother and sister, certain sums of money, and then directed that all the rest, residue and remainder of his estate, both real and personal, be equally divided between his daughter and widow, who was appointed executrix, giving her full power to sell and convert all the estate into money. The personal property was insufficient to pay the legacies in full:

Held, that the legacies were chargeable upon the real estate. (*Id.*)

3. It is the duty of the court to ascertain from the will itself the intention of the testator, and if the provisions of the will are legal, to give effect to them according to the intention of the testator. Invalid provisions, as a matter of course, must fail. (*Lee* agt. *Lee*, ante, 76.)
4. By the will one half of the residuary estate was given to trustees, who were directed to receive the income thereof during the lifetime of the testator's son, H. W. L., and to pay the same to him so long as he should live. But upon his death, leaving a wife him surviving, one-quarter of the income was to be paid to her so long as she should remain unmarried. On his death, without leaving a widow, the whole of such share set apart for his benefit, or if he should leave a widow, three-quarters of such share was given absolutely and in fee to his children. But should his son leave "a widow," then at her death or remarriage the one-quarter of his share was disposed of in like manner as the rest of the share. H. W. L. was married at the time of his father's death, and he, as well as his then wife, are still living:
Held, that it would be premature, at this time, to pronounce this portion of the will invalid, for effect may be given to the tes-

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tator's actual disposition of this one-quarter interest, in the event that H. W. L. should leave no widow at his death. (*Id.*)

5. But as to the one-quarter interest of the one-half of the residuary estate continued in the trustees for the benefit of the widow of his son S. A. L., in the event that he should die leaving a widow, the case is different. S. A. L. died after the testator's death, leaving a widow and several children. These facts present the alternative condition, upon which the trust was to continue after the death of the testator's son, and upon which the gift to the children was made, and such trust is void, and as to this one-quarter of the one-half of the residuary estate, the testator in law died intestate (*quoting Scheller agt. Smith, 41 N. Y., 328*). (*Id.*)

6. Where the will contained a gift of \$2,000, upon the death of the testator's wife, to his grandchildren "in being" at that time, such of them, however, as were under the age of twenty-three years to be paid their shares on arriving at that age:

Held, that grandchildren born after the testator's death, but during the lifetime of the widow, take a share of this gift. Grandchildren born after the death of the widow do not participate in this legacy. The statute disposes of the shares of the grandchildren who died intestate during the lifetime of the widow.

Held, also, that the grandchild H. F. L., although born after the death of his father S. A. L., is embraced within the terms of the gift to his children "then in being," and within the provisions of the statute, and the policy of the law should share equally with the brothers and sisters in the share set to his father. (*Id.*)

7. The after-added provisions of the will, near its close, by which it is

sought to continue the trust over the shares of minors in the residuary estate, is void in so far as the \$2,000 held for the life of Eliza Howe is concerned. That portion of the residuary estate has already been subjected to a trust for two lives. (*Id.*)

8. The gift to the testator's grandchildren was made in absolute terms at the time they were limited to take effect, and the latter-added invalid trust may be dropped, and the principal sum should be paid to the persons entitled thereto, when entitled, as though such latter trust had not been attempted to be made. (*Id.*)

9. A paper purporting to be the will of a resident of New Jersey who died in that state leaving personal property in the county of New York, was propounded in that county for probate. Such paper was not subscribed by its maker, but her name appeared in her own handwriting in its opening sentence, which began: "If I, Cecilia L. Booth, should die," &c. (*In the Estate of Cecilia L. Booth, deceased, ante, 110.*)

10. The instrument from first to last was written by the decedent while two persons were in attendance at her request for the purpose of attesting it. They duly subscribed their names as witnesses, and she acknowledged in their joint presence that the paper so authenticated was her will, at the same time displaying it so that they saw her name as written upon its face:

Held, first, that the sufficiency of the execution of the disputed paper should be tested by the law of New Jersey, and not by that of New York.

Second. That the instrument was duly executed within the New Jersey statute of 1851, which required that a will should be "signed by the testator," and that such signature should be made by him, or the making thereof ac-

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knowledgeed by him in the presence of two witnesses. (*Id.*)

11. During the pendency of proceedings for the probate of an alleged will, the contestant, who was one of the next of kin of the decedent and was named in the disputed paper as a legatee, applied for an order directing the payment of a sum of money to be charged against her legacy or her distributive share accordingly as the disputed paper might thereafter be granted or refused probate. Such paper contained a provision declaring that any legatee or devisee who should contest its validity should forfeit thereby the bequest or devise in his favor. (*In the Estate of Frederick Grote, deceased, ante, 140.*)

12. The respondents having filed an answer setting forth the foregoing facts and alleging that because of them the legality and validity of the petitioner's claim was doubtful. *Held*, that under section 2718 of the Code of Civil Procedure the application must be dismissed. (*Id.*)

13. No express gift to executors is necessary in order to vest them with a trust estate. A trust will be implied when, upon a consideration of the whole will, that clearly appears to have been testator's intention, or when the duties imposed are active and render the legal title in the executors convenient and reasonably necessary, although not essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain, the dispositions of the will. (*Ward agt. Ward and others, ante, 345.*)

14. Testator gave the use and income of all his estate to his widow, and after her death to his two sons, share and share alike, remainder to their heirs, and clothed his executors with such powers and

duties as clearly showed that he contemplated their retaining possession of the estate, and the beneficiaries receiving the income from them:

Held, the estate vested in the executors in trust for the life of the widow, and after her death for the lives of the two sons respectively.

Also, *held*, there is no illegal suspension of the power of alienation. (*Id.*)

15. A gift of income "subject to the necessary expenses" of living and the education of two sons:

Held, to create a charge upon the income in the recipient's hands which she was bound to satisfy. (*Id.*)

16. A desire that "such sums from time to time as may be necessary and deemed advisable to be paid to" persons named "that they * * * may not want for the necessities of life:"

Held, to create charges upon the income of the estate which the widow is bound to satisfy, and which the court will enforce in the event of her failure to do so in good faith.

Further, *held*, the court will not pronounce in advance the legal consequences of an event which has not happened and may never occur. (*Id.*)

17. Where a will provided as follows: "First. After all my lawful debts are paid and discharged, I give and bequeath to C. M., who is now living with me, his heirs and assigns, all that house, lot, tract and parcel of land where I now reside in the town of Almont, Alleghany county, N. Y., containing about forty acres of land." Immediately following this there are sixteen "items" by which the testator bequeaths to twenty-two persons specific sums of money; each clause of the bequest commences: "I give and devise." The eighth

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teenth clause reads: "I give and devise all the rest, residue and remainder of my real estate and of my personal estate, goods and chattels of every kind whatsoever, if any there shall be after paying my debts and the legacies herein-after named to the several legatees hereinbefore named, to be divided between them share and share alike." In a codicil to the will the testator slightly changed some of the bequests and at the end of which was this clause: "I have by my last will referred to above, willed that any remainder or residue of my estate real or personal which may remain after paying debts and legacies, be distributed among the several legatees share and share alike. Now, therefore, I do by this my writing, which I hereby declare to be a codicil to my said will and to be taken as a part thereof, order and declare that my will is, that such distribution be made, not share and share alike, to the *legatees*, but *pro rata* or in proportion to the several *legacies* excepting E. L. and H. B. F. who are not to share in such distribution." C. M. is the only devisee, and the real property above mentioned is the only real property devised. The testator died leaving a small parcel of land undisposed of in any way other than by such residuary clause in the will and codicil:

Held, that the devisee C. M. is not entitled to any portion of the residuary estate, and it should be distributed to the legatees named in the will, in the proportion therein named. (*Matter of Karr*, ante, 405.)

18. Strictly speaking, real estate given by will is devised, and personal estate is bequeathed. The one receiving real estate is termed a devisee, and the one taking personal property a legatee. One act of giving is a devise, the other a bequest. The person receiving a devise or a bequest is a beneficiary. (*Id.*)

19. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he appears to have used them will be the sense in which they are to be construed. (*Id.*)

20. The ordinary as well as technical meaning of the word "*legacy*" is a gift of property by will other than real estate; this is its strict and primary sense and the one generally accepted. This is the meaning that will be attached to the word by the court, unless it clearly appear from the will itself that the testator has used the word in a different sense. (*Id.*)

21. Where a will presents upon its face questions of complication, uncertainty and difficulty, an executor may institute and maintain an action for the purpose of obtaining a judicial construction thereof, and for direction to him as to the manner in which he should discharge his duties in executing the will as such executor. (*Bigart* agt. *Jones*, ante, 491.)

22. It is the policy of the law, in regard to the construction of wills, to give effect to every part thereof, to the end that every beneficiary shall receive the bounty of the testator, according to his intention, as fairly gathered from the entire instrument. (*Id.*)

23. Where the testator by his will bequeathed, after the payment of debts and funeral charges, all of his personal and real estate, except a lot which Elizabeth Akin was to occupy, to his wife, to be used and enjoyed by her during her natural life, or until she should marry. Upon the marriage or death of his widow his daughter Cecilia became entitled to the use and enjoyment during her natural

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life of the estate, real and personal:

Held, that Cecilia did not take a fee under the will, but that her estate should be regarded merely as a life estate. It follows that at the death of Cecilia, if she had left lawful issue her surviving, such issue would have been entitled absolutely to the estate, real and personal. As Cecilia died without leaving such issue the estate, real and personal vested in the persons designated in the sixth clause of the will, subject to the payment of the bequest specified in the will. (*Id.*)

24. It seems to have been the purpose and intention of the testator to consolidate into one fund the real and personal estate at the death or marriage of his widow, and to bequeath or devise the same accordingly, subject to the satisfaction of the burdens which he imposed upon his estate for the benefit of the persons designated therein, to whom he gave certain sums by way of legacy. (*Id.*)

25. Where a will has been so drawn as to allow blank spaces in the body thereof of such a nature as to allow the insertion of dispositions without interlineations, and

Where the testatrix does not subscribe her name in the presence of both witnesses, and does not acknowledge her signature to the witnesses, although she informs the witnesses that it is her will she wishes them to witness:

Held, that there was no sufficient signing of the will by the deceased in the presence of the witnesses, nor a sufficient acknowledgment to them that she had done so to satisfy the requirement of the statute, and that the paper was not entitled to be admitted to probate. (*In the Matter of Catharine Shaffer, deceased, ante, 494.*)

26. Where there is no direct expression of intention that the provision contained in the will shall

be in lieu of dower, the question always is whether the will contains any provision inconsistent with the assertion of a right to command a third of the land to be set out by metes and bounds for dower. The intention of the testator need not be declared in express words, it may be implied if the claim of dower would be plainly inconsistent with the will. (*Cole agt. Cole et al., ante, 516.*)

27. Where the will gave all the testator's real and personal estate to plaintiff (widow) as executrix and John M. Corliss and William Carley as executors in trust for uses and purposes therein stated, among which are the following: "First. To receive and collect the income thereof, and to pay the same for my debts, and the incumbrances upon my estate, after the payment of such sums as may be necessary for the support and education of my family and children, in which matters I desire my executrix and executors to be liberal. Second. To purchase in their own names as such executrix and executors a homestead for my wife and family if I shall not do so in my lifetime, and in such homestead all my children shall be entitled to a home while they remain unmarried." The testator in his lifetime purchased the homestead and owned it at the time of his death:

Held, that the intention of the testator is reasonably clear that the widow should take all of her interest in that homestead under the will. She is given an interest equal to that of each child. The devise must contemplate a homestead discharged of dower, otherwise the object of the testator as expressed might be defeated by assumption of dower right, and possible sale of the homestead under such claim. (*Id.*)

28. The testator directed that in case of the remarriage of his wife all of his estate shall be divided

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equally among his four children, and be paid to them respectively as they arrive at full age:

Held, that if one-third of the real estate were to be set apart to the widow as dower, a division of all of the estate among such children could not take place until the widow's death notwithstanding a remarriage by her. Thus a provision of the will would be defeated. (*Id.*)

See DOWER.

Mason agt. *Mason et al.*, ante, 514.

See TRUST.

Bowker and others agt. *Wells and others*, ante, 150.

WITNESS.

1. Actions against trustee to recover corporate debts as a penalty for failure to file annual reports are "penalties," within the meaning of section 837 of the Code of Civil Procedure. In such actions a party defendant is privileged from answering any question concerning the facts alleged in the complaint and cannot be compelled to answer upon an examination before trial any question which would support the claim of the plaintiffs, either against himself or his co-defendants. (*Hughen* agt. *Woodward*, ante, 127.)
2. By section 834 of the Code of Civil Procedure, a physician is prohibited from disclosing any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, and the seal of the law placed upon such disclosures can be removed only by the express waiver of the patient himself. (*Westover* agt. *The Aitna Ins. Co.*, ante, 184.)
3. Whenever the evidence comes within the purview of the statute it is absolutely prohibited and may

be objected to by any one, unless it be waived by the person for whose benefit the statute was enacted. (*Id.*)

4. An executor or administrator does not represent a deceased person for the purpose of making such a waiver. He represents him simply in reference to right of property and not in reference to those rights which pertain to the person and character of the testator (*Reversing S. C.*, ante, 163). (*Id.*)
5. This action was brought by the receiver of an insolvent firm of brokers against one of the partners, and against the general assignee of the said partner and the general assignee of the firm, to enforce an equitable lien upon the assets in the hands of the assignee of the defendant partner, for money wrongfully withdrawn from the firm by his assignor. The plaintiff procured an order for the examination, before trial, of the defendant partner, upon an affidavit alleging that the partner withdrew money from the firm as profits, when he knew that no profits had been realized and that the firm was insolvent, and that he withdrew the said funds with the intent to hinder, delay and defraud the creditors thereof: *Held*, that it was error to set aside the order, upon the ground that the examination would tend to establish the commission of some criminal offense by the witness. (*Davies* agt. *Fish*, 35 *Hun*, 430.)
6. That the wrongful withdrawal of the moneys from the firm did not constitute a criminal offense under the laws of this State. (*Id.*)
7. That on his examination he would have the protection afforded to witnesses examined in open court, and could shield himself from injury under the rules applicable in such cases. (*Id.*)

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8. Right of one accused of crime to be confronted with witnesses — meaning of the requirement — U. S. Constitution, art. 6 and art. 14, sec. 1 — bill of rights, sec. 14 — Code of Criminal Procedure, sec. 8, sub. 3. (*See People agt. Williams*, 35 Hun, 516.)
9. Contempt — the refusal of a witness to answer questions may be punished either criminally or civilly — Code of Civil Procedure, sec. 8, sub 5; sec. 14, sub. 5; sec. 2285 — length of the confinement — form of the commitment. (*See, People ex rel. Jones agt. Davidson*, 35 Hun, 471.)
10. Evidence — meaning of the words "interested in the event" in section 829 of the Code of Civil Procedure. (*See Moore agt. Oviatt*, 35 Hun, 216.)
11. Opinions of witnesses as to the peaceable disposition of a dog by whom the plaintiff has been bitten. (*See Caldwell agt. Snook*, 35 Hun, 78.)
12. The provision of the Code of Civil Procedure (sec. 829), prohibiting a party to an action from testifying in his own behalf against an executor, etc., of a deceased person "concerning a personal transaction or communication between the witness and the deceased person," does not necessarily, and under all circumstances, exclude the evidence of a party so testifying, when it tends only to negative or affirm the existence of such a transaction or communication. (*Levis agt. Merrill*, 98 N. Y., 206.)
13. Where the party representing the deceased person has as a witness in his own behalf given material evidence, the adverse party, although precluded from directly proving the existence of such a transaction or communication, may testify as to extraneous facts tending to controvert such evidence, although those facts may incidentally tend to establish the inference that such a transaction or communication has or has not taken place. (*Id.*)

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